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188-241

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 241.

THE ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JULY 14, 1880.

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1 UNITED STATES OF AMERICA,
State of Illinois, Supreme Court, Central Grand Division, ss:

In the supreme court, central grand division, January term, A. D. 1876.

Proceedings had before the honorable the supreme court of the central grand division of the State of Illinois, begun and held at Springfield, to wit, on the fourth day of January, A. D. 1876.

Present, John M. Scott, chief justice, Sidney Breese, justice, Pinkney H. Walker, justice, Benjamin R. Sheldon, justice, John Scholfield, justice, Alfred M. Craig, justice, T. Lyle Dickey, justice, E. C. Hamburgher, clerk.

Be it remembered that heretofore, to wit, on the fifth day of January, A. D. 1876, there was filed in the office of the clerk of said supreme court a record from the circuit court of Douglas County, which is in the words and figures following, to wit:

1½ UNITED STATES OF AMERICA,
State of Illinois, Douglas County, ss:

In the circuit court, October term, A. D. 1874.

Pleas before the honorable Oliver L. Davis, judge of the fifteenth judicial circuit of the State of Illinois, and sole presiding judge of the circuit court of Douglas County, in the State aforesaid, and at a term thereof begun and held at the court-house in the city of Tuscola, in said county, on the second Monday (being the twelfth day) of October, in the year of our Lord one thousand eight hundred and seventy-four and of the Independence of the said United States the ninety-eighth.

Present, honorable Oliver L. Davis, judge of the 15th judicial circuit of the State of Illinois, Robert B. Macpherson, State's attorney, Francis G. Cunningham, sheriff.

Attest:

PATRICK C. SLOAN, *Clerk.*

Be it remembered that heretofore, to wit, on the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and
2 seventy-four, The People of the State of Illinois, by James K. Easall, their attorney, filed in the office of the clerk of said court a certain præcipe for summons, which is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Douglas County:

In the circuit court *to* October term, A. D. 1874.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Debt.

The clerk of said circuit court will please issue a summons in debt in

the above entitled cause, directed to the sheriff of Douglas County, and rernable to the above term of court.

Debt, $100,000.00.

Damages, $5,000.00.

Springfield, April 22nd,1874.

JAS. K. EASALL,
Attorney-General, for Plaintiffs.

And on the 25th day of April, in the year last aforesaid, there
3 issued out of said clerk's office the people's writ of summons, which said writ, together with the return of the sheriff thereon indorsed, is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Douglas County, ss:

The People of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon The Illinois Central Railroad Company, if it shall be found in your county, personally to be and appear before the circuit court of said county on the first day of the next term thereof, to be holden at the court-house in Tuscola, in said county, on the second Monday of October next, to answer unto The People of the State of Illinois of a plea that it render to the said People of the State of Illinois the sum of one hundred thousand dollars, debt which it owes and unjustly detains from them, to the damage of said plaintiffs, as they say, in the sum of five thousand dollars, and have you then and there this writ, with an
4 endorsement thereon in what manner you shall have executed the same.

Witness Patrick C. Sloan, clerk of our said court, and the seal thereof, at Tuscola, in said county, this 25th day of April, A. D. 1874.

[SEAL.] PATRICK C. SLOAN, *Clerk.*

STATE OF ILLINOIS,
Douglas County, ss:

I have duly served the within by delivering a true copy thereof to Elias Hewitt, the station agent of said Illinois Central Railroad Company in charge of the station on said railroad at Tuscola, in said county, as therein commanded, John Newell, the president of said Illinois Central Railroad Company, not being found in my county, this 9th day of May, A. D. 1874.

F. G. CUNNINGHAM,
Sheriff.

And afterward, to wit, on the 26th day of September, A. D. 1874, the said plaintiffs, by their said attorney, filed in said clerk's office their certain declaration, which is in words and figures as follows, to wit:

5 STATE OF ILLINOIS,
Douglas County, ss:

In the circuit court, to the October term, A. D. 1874.

The Illinois Central Railroad Company was summoned to answer the

People of the State of Illinois of a plea that it, the said Illinois Central Railroad Company, render to the said People of the State of Illinois one hundred thousand dollars, lawful money of the United States, which it owes to and unjustly detains from them; and thereupon the said People of the State of Illinois, by James K. Easall, the attorney-general of the State of Illinois, complains:

For that whereas heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, the said defendant was a railroad corporation organized under the laws of the State of Illinois and doing business in said State of Illinois, and that said defendant was then and there owning and operating a certain railroad lying wholly within the State of Illinois, running from the city of Chicago, in the county of Cook, in said State of Illinois, to the city of Cairo, in the county of Alexander, and through the said county of Douglas, and then and there
6 doing business as a common carrier upon and over said railroad; and afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Albert M. Woody and William H. Russell, whose firm name was Woody and Russell, carried and transported for said Woody and Russell, from Chicago aforesaid, to Tuscola, in said county of Douglas, upon and over said railroad, a large quantity, to wit, five barrels of beans of a certain weight, to wit, in all of eleven hundred and seventy pounds, of the goods and chattels of said Albert M. Woody and William H. Russell, then and there being, and that said defendant afterwards, to wit, on the day and year aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Woody & Russell, as and for the defendant's toll and compensation for the said carriage and transportation of said five barrels of beans upon and over said railroad from said city of Chicago to said Tuscola, in said county of Douglas, in manner aforesaid, a large sum of money, to wit, the sum of four dollars and forty-five cents, and that said sum of money so charged,
7 collected, demanded, and received by said defendant of and from said Woody and Russell for the carrying and transportation of said five barrels of beans as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation of and for said five barrels of beans in manner aforesaid in a large sum of money, to wit, in the sum of eighty-three $\frac{47}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of the said statute an action hath accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, parcel of the sum above demanded.

2nd. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from
8 said Tuscola, in said county of Douglas, to Chicago, in the county of Cook aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said

defendant as such common carrier, at the special instance and request of Albert M. Woody and William H. Russell, carried and transported for said Woody and Russell from Chicago aforesaid, to Tuscola aforesaid, upon and over said railroad, certain other goods, wares, and merchandise, to wit, five sacks of potatoes, five barrels of potatoes, one barrel of apples, and one keg of syrup, of a certain weight, to wit, the weight in all of fifteen hundred and ten pounds, of the goods and chattels of said Woody & Russell then and there being, and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Woody and Russell as and for said defendant's toll and compensation for said the carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said Tuscola in
9 manner aforesaid, a large sum of money, to wit, the sum of five dollars and fifteen cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Woody and Russell for the carriage and transportation of said last mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of one dollar and sixty-seve' cents and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

10 3rd. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said Tuscola, in said county of Douglas, to Chicago, in the county of Cook aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterward , to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Albert M. Woody and William H. Russell, carried and transported for said Woody and Russell, from Chicago aforesaid to Tuscola aforesaid, upon and over said railroad, certain other goods, wares, and merchandise, to wit, seventy-two barrels of salt of a certain weight, to wit, of the weight in all of twenty thousand and six hundred pounds, of the goods and chattels of said Albert M. Woody and William H. Russell then and there being, and that said defendant afterwards, to wit, on the day and year last
11 aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Woody and Russell, as and for said defendants, toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad, from said city of Chicago to said Tuscola, in manner aforesaid, a large sum of money, to wit, the sum of twenty-nine dollars and twenty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Albert M.

Woody and William H. Russell, for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof, in manner aforesaid, in a large sum of money, to wit, in the sum of three dollars and fifty-five cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and
12 thereby and by force of said statute an action has accrued to the said People of the State of Illinois, to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

4th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said town of Tuscola, in said county of Douglas, to Chicago, in the county of Cook aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Albert M. Woody and William H. Russell, carried and transported
13 for said Woody and Russell from Chicago aforesaid to Tuscola aforesaid, upon and over said railroad certain other goods, ware', and merchandize, to wit, ten kegs of syrup of a certain weight, to wit, of the weight in all of six hundred pounds, of the goods and chattels of said Albert M. Woody and William H. Russell then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Woody and Russell, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago, in the State of Illinois, to said Tuscola, in Douglas County, in manner aforesaid, a large sum of money, to wit, the sum of one dollar and eighty-five cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Woody and Russell for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then
14 and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of twenty cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action hath accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the sum above demanded.

5. And whereas, also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said

Tuscola in said county of Douglas to the city of Mattoon in the
15 county of Coles, in the State of Illinois aforesaid, and then and
there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant as such common carrier, at the special instance and request of Albert M. Woody and William H. Russell, carried and transported for said Woody and Russell from Mattoon aforesaid to Tuscola aforesaid, upon and over said railroad, certain other goods, wares, and merchandise, to wit, three barrels of coal oil of a certain weight, to wit, of the weight of one thousand and fifty pounds of the goods and chattels of said Albert M. Woody and William H. Russell then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Woody and Russell as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise
16 upon and over said railroad from said Mattoon to said Tuscola, in
manner aforesaid, a large sum of money, to wit, the sum of two dollars and sixty-five cents, and that said mentioned sum so charged, collected, demanded, and received by said defendant of and from said Woody and Russell for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof, in manner aforesaid in a large sum of money, to wit, the sum of eigh'y-one $\frac{65}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the sum above demanded.

17 6th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said Tuscola, in said county of Douglas, to Effingham, in the county of Effingham, in the State of Illinois aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Albert M. Woody and William H. Russell, carried and transported for said Woody and Russell, from Effingham aforesaid, to Tuscola aforesaid, upon and over said railroad, certain other goods, wares, and merchandise, to wit, one tierce of rice and five barrels of dried apples, of a certain weight, to wit, of the weight in all of eighteen hundred and eighty pounds of the goods and chattels of said Albert M. Woody and William H. Russell, then and there being, and that said de-
18 fendant afterwards, to wit, on the day and year last aforesaid, at
the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Woody and Russell, as and for said defendant's toll and compensation for said carriage and transportation of said last-men-

tioned goods, wares, and merchandize upon and over said railroad, from said Effingham to said Tuscola, in manner aforesaid, a large sum of money, to wit, the sum of five dollars and seventy-five cents, and that said mentioned sum of money, so charged, collected, demanded, and received by said defendants of and from said Woody and Russell, for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of two dollars and forty-nine cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made
19 and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby, and by force of said statute, an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

7th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois and running from said Tuscola, in said county of Douglas, to Chicago, in the county of Cook aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Albert
20 M. Woody and William H. Russell carried and transported for said Woody and Russell from Tolona, in Champaign County, in the State of Illinois, to Tuscola aforesaid upon and over said railroad certain other goods, wares, and merchandise, to wit, three cases of shoes, not strapped, of a certain weight, to wit, of the weight in all of one hundred and fifty pounds, of the goods and chattels of said Albert M. Woody and William H. Russell then and there being, and that said defendant afterwards, to wit, on the day and year last aforesaid, charged, collected, demanded, and received of and from said Woody and Russell, as and for said defendants' toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said Tolono to said Tuscola, in manner aforesaid, a large sum of money, to wit, the sum of one dollar and ten cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Woody and Russell for the carriage and transportation of said last-mentioned goods, wares, and
21 merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of two cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois and thereby, and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

8th. And whereas, also, the said defendant heretofore, to wit, on first day

of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running
22 from said Chicago, in said county of Cook, to Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson and Lawson from Chicago aforesaid to Tuscola aforesaid, upon and over said railroad, certain other goods, wares, and merchandise, to wit, one bundle of castings of a certain weight, to wit, of the weight, in all, of twenty pounds, of the goods and chattels of said Manassah M. and Benjamin F. Lawson then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson and Lawson as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise
23 upon and over said railroad from said Chicago to said Tuscola in manner aforesaid a large sum of money, to wit, the sum of sixty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Lawson and Lawson for the carriage and transportation of said last-mentioned good', wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of fifty cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois; and thereby and by force of said statute an action has accrued to the saide People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the sum above demanded.

24 9th. And whereas, also, the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said Chicago, in said county of Cook, to Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson and Lawson from Chicago aforesaid to Tuscola aforesaid, upon and over said railroad, certain other good', wares, and merchandise, to wit, thirteen springs and one box of iron bolts of a certain weight, to wit, of the weight in all of three hundred and thirty pounds of the goods and chattels of said Lawson and Lawson then and there being, and that said defendant
25 afterwards, to wit, on the day and year last aforesaid, at the county

of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson and Lawson, as and for said defendants, toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said Chicago aforesaid to said Tuscola in manner aforesaid, a large sum of money, to wit, the sum of one dollar and forty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Lawson and Lawson for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of twenty-eight cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illi-
26 nois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

10th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to Tuscola in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson Bros., from said city of Chicago to Tuscola aforesaid, upon and
27 over said railroad, certain other goods, wares, and merchandise, to wit, four bundles of strap iron and one part of a keg of rivets, of a certain weight, to wit, of the weight in all of six hundred and fifty pounds, of the goods and chattels of said Manassah M. Lawson and Benjamin F. Lawson then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said Tuscola in manner aforesaid, a large sum of money, to wit, the sum of two dollars and forty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Lawson Bros. for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation
28 thereof in manner aforesaid in a large sum of money, to wit, in the sum of eighty-nine cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said Peo-

ple of the State of Illinois, and thereby and by force of said statute an action has accrued to the said people to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

11th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad;

29 and afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson Bros., from said city of Chicago to Tuscola aforesaid, upon and over said railroad, certain other goods, ware', and merchandise, to wit, two boxes of hardware, two bundles of wash-boards, one bundle of copper, one box of clothes pins, one bundle of Russian iron, two bundles of sieves, two boxes of tin plate, and one coil of rope, of a certain weight, to wit, of the weight in all of seven hundred pounds, of the goods and chattels of said Manassah M. Lawson and Benjamin F. Lawson then and there being; and that said defendant afterwards, to wit, on the day and year last, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and

30 over said railroad from said city of Chicago to said Tuscola in manner aforesaid, a large sum of money, to wit, the sum of four dollars and five cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Lawson Bros. for the carriage and transportation of said last mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of one dollar, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

31 12th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D.. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within the said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such

common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson Bros., from said city of Chicago to said town of Tuscola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, two boxes of tin plate and one barrel of hardware, of a certain weight, to wit, of the weight in all of four hundred and eighty pounds, of the goods and chattels of said Manassah M. Lawson and Benjamin F. Lawson then and there being; and that said de-
32 fendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of two dollars, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Lawson Bros. for the carriage and transportation of said last-mentioned good', wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of seventy cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illi-
33 nois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

13th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson Bros., from said city of Chicago to said town of Tuscola, upon and over said railroad, certain other goods, wares, and mer-
34 chandise, to wit, thirteen slabs of plow steel of a certain weight, to wit, of the weight in all of six hundred and forty pounds, of the goods and chattels of Lawson Bros. then and there being and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of three dollars and five cents, and that said mentioned sum of money so charged, collected, demanded, and received by

said defendant of and from said Lawson and Bros. for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of sixty cents,
35 and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the sum above demanded.

14th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to the town of Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as
36 such common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson Bros., from said city of Chicago to said town of Tuscola, upon and over said railroad, certain other goods, ware', and merchandise, to wit, three boxes of tin plate, two boxes of hod irons, and one box of hardware, of a certain weight, to wit, of the weight in all of nine hundred and forty pounds, of the goods and chattels of said Lawson Bros. then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of three
37 dollars and ninety cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Lawson and Bros. for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of one dollar and twenty and $\frac{1}{3}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the sum above demanded.

38 15th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Dougla

aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said town of Tuscola, in said county of Douglas, to the town of Tolono, in the county of Champaign, in the State of Illinois aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson Bros., from said town of Tolono to said town of Tuscola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, five cook stoves, &c., five stove scrapers, and one ash pan, of a certain weight, to wit, the weight in of nine hundred and thirty pounds, of the goods and chattels of said Lawson Bros., then and
39 there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said town of Tolono to said town of Tuscola in manner aforesaid, a large sum of money, to wit, the sum of three dollars and seventy-eight cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Lawson and Bros. for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of one dollar and forty-three and $\frac{2}{3}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary
40 to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the sum above demanded.

16th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly with' said State of Illinois, and running from said Tuscola, in said county of Douglas, to the city of Mattoon, in the county of Coles and State of Illinois aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid. the said defendant, as such common
41 carrier, at the special instance and request of Lawson Bros., a firm composed of Manassah M. Lawson and Benjamin F. Lawson, carried and transported for said Lawson & Bros., from said city of Mattoon to said town of Tuscola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, two barrels of castor-oil and one piece stove casting, and one stove plate of a certain weight, to wit, of the weight, n all, of seven hundred and forty pounds, of the goods and chattels of

said Lawson Bros. then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Mattoon to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of two dollars and five cents, and that said mentioned sum of
42 money so charged, collected, demanded, and received by said defendant of and from said Lawson and Bros. for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded, a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of seventy-one and $\frac{54}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionaté, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

17th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas, aforesaid, was a railroad corporation, and then and there owning and
43 operating a certain railroad lying wholly within said State of Illinois, and running from said town of Tuscola, in said county of Douglas, to Chicago, in the county of Cook, in the State of Illinois aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris carried and transported for said John M. Maris from Chicago aforesaid to Tuscola aforesaid upon and over said railroad certain other goods, wares, and merchandise, to wit, seventy barrels of salt of a certain weight, to wit, of the weight in all of twenty thousand pounds, of the goods and chattels of said John M. Maris then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and re-
44 ceived of and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said Chicago to said Tuscola in manner aforesaid a large sum of money, to wit, the sum of twenty-eight dollars and thirty-five cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said John M. Maris for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of three dollars and fifty-five cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the said People of State of Illinois, and thereby and by force of said statute
45 an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

18th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to the town of Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris, car-
46 ried and transported for said John M. Maris from said city of Chicago to said town of Tuscola upon and over said railroad certain other goods, wares, and merchandise, to wit, three boxes of glassware of a certain weight, to wit, of the weight in all of one hundred and forty pounds, of the goods and chattels of said John M. Maris, then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of *Tuscola* to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of eighty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said John M. Maris for the carriage and transportation of said last last-mentioned goods, wares, and mer-
47 chandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of fifteen cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to have and demand of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

19th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and oper-
48 ating a certain railroad lying wholly within said State of Illinois, and running from said town of Tolono, in said county of Champaign, in the State of Illinois, to the town of Tuscola, in the county of Douglas aforesaid, and then and there doing business a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris, carried and transported for said John M. Maris from said town

said Lawson Bros. then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Lawson Bros., as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Mattoon to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of two dollars and five cents, and that said mentioned sum of
42 money so charged, collected, demanded, and received by said defendant of and from said Lawson and Bros. for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded, a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of seventy-one and $\frac{54}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

17th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas, aforesaid, was a railroad corporation, and then and there owning and
43 operating a certain railroad lying wholly within said State of Illinois, and running from said town of Tuscola, in said county of Douglas, to Chicago, in the county of Cook, in the State of Illinois aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris carried and transported for said John M. Maris from Chicago aforesaid to Tuscola aforesaid upon and over said railroad certain other goods, wares, and merchandise, to wit, seventy barrels of salt of a certain weight, to wit, of the weight in all of twenty thousand pounds, of the goods and chattels of said John M. Maris then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and re-
44 ceived of and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said Chicago to said Tuscola in manner aforesaid a large sum of money, to wit, the sum of twenty-eight dollars and thirty-five cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said John M. Maris for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of three dollars and fifty-five cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the said People of State of Illinois, and thereby and by force of said statute
45 an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

18th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to the town of Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris, car-
46 ried and transported for said John M. Maris from said city of Chicago to said town of Tuscola upon and over said railroad certain other goods, wares, and merchandise, to wit, three boxes of glassware of a certain weight, to wit, of the weight in all of one hundred and forty pounds, of the goods and chattels of said John M. Maris, then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of *Tuscola* to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of eighty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said John M. Maris for the carriage and transportation of said last last-mentioned goods, wares, and mer-
47 chandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of fifteen cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to have and demand of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

19th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and oper-
48 ating a certain railroad lying wholly within said State of Illinois, and running from said town of Tolono, in said county of Champaign, in the State of Illinois, to the town of Tuscola, in the county of Douglas aforesaid, and then and there doing business a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris, carried and transported for said John M. Maris from said town

of Tolono to said town of Tuscola, upon and over said railroad certain other goods, wares, and merchandise, to wit, fifteen barrels of sugar of a certain weight, to wit, of the weight in all of three thousand six hundred and forty pounds, of the goods and chattels of said John M. Maris then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and of said last-
mentioned goods, wares, and merchandise upon and over said rail-
49 road from said town of Tolono to said town of Tuscola in manner aforesaid a large sum of money, to wit, the sum of five dollars and ten cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said John M. Maris for the carriage and transportation of said last mentioned good', wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of one dollar and sixty cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby, and by force of said statute, an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

50 20th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Champaign, in said county of Champaign, in the State of Illinois, to the town of Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris, carried and transported for said John M. Maris from Champaign aforesaid to Tuscola aforesaid upon and over said railroad certain other goods, wares, and merchandise, to wit, two barrels of coal oil of a certain weight, to wit, of the weight in all of seven hundred and fifty pounds, of the goods and chattels of said John M. Maris then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of
51 and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Champaign to said town of Tuscola, in manner aforesaid, a large sum of money, to wit, the sum of one dollar and ninety cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said John M. Maris for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner

aforesaid in a large sum of money, to wit, in the sum of sixty and ¼ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the
52 said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

21st. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said town of Tolono, in said county of Champaign, in the State of Illinois, to the town of Tuscola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris, carried and transported for said John M. Maris from said town of Tolono to said town of Tuscola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, three half chests of tea of a certain weight, to wit, of the weight in all of 200 pounds, of the goods and chattels of
53 said then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise, upon and over said railroad, from said town of Tolono to said town of Tuscola, in manner aforesaid, a large sum of money, to wit, the sum of forty-two cents, and that said sum of money so charged, collected, demanded, and received by said defendant of and from said John M. Maris for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of eight and ⅔ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form
54 of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

22nd. And whereas, also, the said defendant, heretofore, to wit, on the first day of March, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to the town of Arcola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last afore-

said, at the county of Douglas aforesaid, the said defendant as such common carrier, at the special instance and request of Patrick H. Monahan, carried and transported for said Patrick H. Monahan, from said city of Chicago to said town of Arcola upon and over said railroad, certain other goods, wares, and merchandise, to wit, four bundles of paper and five sacks of turnips of a certain weight, to wit, of the weight in all of one thousand and fifty pounds, of the goods and chattels of said Patrick H. Monahan, then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Patrick H. Monahan as and for defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago, to said town of Arcola, in manner aforesaid, a large sum of money, to wit, *the sum of money, to wit*, the sum of three dollars and sixty cents; and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Patrick H. Monahan for the carriage and transportation of said last-mentioned goods, wares, and merchandise, as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of ninety-one and $\frac{30}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

23rd. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from the city of Chicago, in said county of Cook, in the State of Illinois, to Arcola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Patrick H. Monahan, carried and transported for said Patrick H. Monahan, from said city of Chicago, to said town of Arcola, upon and over said railroad certain other goods, wares, and merchandise, to wit, eight kegs of nails of a certain weight, to wit, of the weight in all of eight hundred and sixty pounds, of the goods and chattels of said Patrick H. Monahan, then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Patrick H. Monahan, as and for said defendant's toll and compensation for said carriage and transportation of said last-mentioned goods, ware', and merchandise upon and over said railroad from said city of Chicago to said town of Arcola, in manner aforesaid, a large sum of money, to wit, the sum of two dollars and seventy-five cents, and that said mention' sum of money so charged,

collected, demanded, and received by said defendant of and from said Patrick H. Monahan, for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof, in manner aforesaid, in a large sum of money, to wit, in the sum of seventy and $\frac{1}{2}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois; and thereby and by force of said statute an action has accrued to the said People of State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

59 24th. And whereas also the said defendant heretofore, to wit, on the first day of February, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from said city of Chicago, in said county of Cook, in the State of Illinois, to Arcola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant as such common carrier, at the special instance and request of Patrick H. Monahan, carried and transported for said Patrick H. Monahan, from said city of Chicago to said town of Arcola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, ten barrels of potatoes of a certain weight, to wit, of the weight in all of seventeen hundred and seventy pounds, of the goods and chattels of said Patrick H. Monahan then and there being; and that said defendant afterwards, to wit, on the day and year

60 last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Patrick H. Monahan, as and for defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said town of Arcola, in manner aforesaid, a large sum of money, to wit, the sum of five dollars and seventy-five cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Patrick H. Monahan for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of one dollar and forty-nine $\frac{10}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against

61 the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

25th. And whereas also the said defendant, heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a cer-

tain railroad lying wholly within said State of Illinois, and running from said town of Arcola, in said county of Douglas, to Mattoon, in the county of Coles, in the State of Illinois aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of
62 Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Patrick H. Monahan, carried and transported for said Patrick H. Monahan, from Mattoon aforesaid to Arcola aforesaid, upon and over said railroad, certain other goods, wares, and merchandise, to wit, two crates of earthenware of a certain weight, to wit, of the weight in all of two thousand two hundred and twenty pounds, of the goods and chattels of said Patrick H. Monahan then and there being, and that said defendant afterwards, to wit, on the day and year last aforesaid, charged, collected, demanded, and received of and from said Patrick H. Monahan, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said Mattoon to said Arcola, in manner aforesaid, a large sum of money, to wit, the sum of three dollars and thirty-five cents, and that said mentioned sum of money so
63 charged, collected, demanded, and received by said defendant of and from said Patrick H. Monahan for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of one dollar and sixteen $\frac{78}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

26th. And whereas also the said defendant heretofore, to wit,
64 on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from the town of Tolono, in said county of Champaign, in the State of Illinois, to Arcola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad; and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant as such common carrier, at the special interest and request of Patrick H. Monahan, carried and transported for said Patrick H. Monahan, from said town of Tolono to said town of Arcola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, one box of baking powders of a certain weight, to wit, of the weight in all of forty pounds, of goods and chattels of said Patrick H. Monahan then and there being; and that said defendant afterwards, to wit, on the day and year
65 last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Patrick H. Monahan, as and for said defendant's toll and compensation for the said carriage

and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said town of Tolono to said town of Arcola in manner aforesaid, a large sum of money, to wit, the sum of twenty-seven cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Patrick H. Monahan for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of nineteen & ⅓ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity
66 of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

27th. And whereas also the said defendant heretofore, to wit, on the first day of October, A. D. 1873, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from the city of Effingham, in said county of Effingham and State of Illinois, to the town of Arcola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant, as such common carrier, at the special instance and request of Patrick H. Mona-
67 han, carried and transported for said Patrick H. Monahan, from said city of Effingham to said town of Arcola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, eighty sacks of flour of a certain weight, to wit, of the weight in all of four thousand pounds, of the goods and chattels of said Patrick H. Monahan then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas, charged, collected, demanded, and received of and from said Patrick H. Monahan, as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Effingham to said town of Arcola in manner aforesaid, a large sum of money, to wit, the sum of eleven dollars, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Patrick H. Monahan
68 for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of two dollars and sixty cents, and was then and there unjust, unfair, unreasonable, and exortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

28th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas afore-
69 said, was a railroad corporation, and then and there owning and operating a certain railroad, lying wholly within said State of Illinois, and running from the city of Chicago, in said county of Cook, in the State of Illinois, to the town of Arcola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant as such common carrier, at the special instance and request of Franklin R. Coffin and John B. Seymour, who composed the firm of Coffin and Seymour, carried and transported for said Coffin and Seymour, from said city of Chicago to said town of Arcola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, one bale of bags of a certain weight, to wit, of the weight in all of one hundred pounds, of the goods and chattels of said Coffin & Seymour then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of
70 and from said Coffin & Seymour as and for said defendant's toll and compensation for the said carriage of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said town of Arcola in manner aforesaid, a large sum of money, to wit, the sum of sixty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Coffin and Seymour for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid in a large sum of money, to wit, in the sum of twenty and $\frac{37}{100}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of
71 said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

29th. And whereas also the said defendant heretofore, to wit, on the first day of March, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from the city of Mattoon, in said county of Coles, in the State of Illinois, to the town of Arcola, in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant as such common carrier, at the special instance and request of Frank R. Coffin and John B. Seymour, doing business under the name of Coffin & Seymour, car-
72 ried and transported for said Coffin and Seymour from said city of Mattoon to said town of Arcola, upon and over said railroad, certain other goods, wares, and merchandise, to wit, five crates of earthenware of a certain weight, to wit, of the weight in all of five thousand one hundred & fifty pounds, of the goods and chattels of said Coffin and Sey-

mour then and there being; and that said defendant, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, charged, collected, demanded, and received of and from said Coffin and Seymour as and for defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad, from said city of Mattoon to said town of Arcola, in manner aforesaid, a large sum of money, to wit, the sum of seven dollars and seventy-five cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Coffin and Seymour for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of two dollars and sixty-five $\frac{4}{5}$ cents, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

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30th. And whereas also the said defendant heretofore, to wit, on the first day of April, A. D. 1874, to wit, at the county of Douglas aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad lying wholly within said State of Illinois, and running from the city of Chicago, in said county of Cook, in the State of Illinois, to the town of Arcola in the county of Douglas aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to wit, on the day and year last aforesaid at the county of Douglass aforesaid, the said defendant as such common carrier, at the special instance and request of Joseph Wagner and William Snyder doing business under the name of Wagner and Snyder, carried and transported for said Wagner and Snyder, from the city of Chicago to the said town of Arcola, upon and over said railroad certain other goods, wares, and merchandise, to wit, seventy thousand shingles of a certain weight, to wit, of the weight in all of twenty thousand pounds, of the goods and chattels of said Wagner and Snyder then and there being; and that said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded, and received of and from said Wagner and Snyder as and for said defendant's toll and compensation for the said carriage and transportation of said last-mentioned goods, wares, and merchandise upon and over said railroad from said city of Chicago to said town of Arcola, in manner aforesaid, a large sum of money, to wit, the sum of thirty-six dollars and forty cents, and that said mentioned sum of money so charged, collected, demanded, and received by said defendant of and from said Wagner and Snyder for the carriage and transportation of said last-mentioned goods, wares, and merchandise as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to wit, in the sum of six dollars and thirty-four cents, and was then and there unjust,

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unfair, unreasonable, and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby and by force of said
76 statute an action has accrued to the said People of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded.

And whereas also heretofore, to wit, on the first day of March, A. D. 1874, at the county of Douglas aforesaid, the said defendant was a railroad corporation organized under the laws of the State of Illinois and doing business in said State of Illinois, and that the said defendant was then and there owning and operating a certain railroad lying wholly within the said State of Illinois, running from said city of Chicago, in said county of Cook, in the State of Illinois, to said city of Cairo, in the county of Alexander, in the State of Illinois aforesaid, and then and there doing business as a common carrier upon and over said railroad, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant made an unjust discrimination in its rates and charges
77 of toll and compensation for the transportation of freight upon and over the said railroad from the city of Mattoon, in the State of Illinois, to the town of Arcola, that is to say, that on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant carried and transported from said city of Mattoon to said town of Arcola, in said Douglas County, upon and over its said railroad, for one Patrick H. Monahan a certain quantity, to wit, two crates of earthenware of the goods and chattels of the said Patrick H. Monahan, then and there being, and that afterwards, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, the said defendant charged, collected, demanded, and received of and from the said Patrick H. Monahan, as and for the said defendant's toll and compensation for the carriage and transportation of said last-mentioned two crates of earthenware upon and over said railroad from said city of Mattoon to said town of Arcola in manner aforesaid, a certain sum of money, to wit, the sum of three dollars and thirty-five cents,
78 the same then and there being at a rate of, to wit, fifteen $\frac{249}{259}$ cents per hundred pounds for the carriage and transportation of said last-mentioned two crates of earthenware of the weight of two thousand two hundred and twenty pounds; and that said defendant also, to wit, on the day and year last aforesaid, at the county of Douglas aforesaid, carried and transported from the said city of Mattoon to said town of Arcola upon and over said railroad, for Frank R. Coffin and John B. Seymour, composing the firm of Coffin & Seymour, a certain quantity, to wit, five crates of earthenware of the weight of five thousand one hundred and eighty pounds of the goods and chattels of them, the said Frank R. Coffin and John B. Seymour, then and there being, and that the said defendant then and there charged, collected, demanded, and received of and from said Coffin and Seymour as and for said defendant's toll and compensation for the carriage and transportation of said last-mentioned five crates of earthenware as aforesaid only the sum of seven dollars and seventy-five cents, the same
79 being then and there only at the rate of fourteen $\frac{10}{11}$ cents per hundred pounds for the carriage and transportation of said last-mentioned five crates of earthenware as aforesaid, contrary to the form of the statute

in such case made and provided, and against the peace and dignity of the said people of the State of Illinois, and thereby and by force of said statute an action hath accrued to the said People of the State of Illinois to demand, and have of and from the said defendant, the sum of five thousand dollars, other parcel of the said sum above demanded.

Yet, nevertheless, the said defendant, although often requested to do so, hath not as yet paid the said several sums of money demanded, or any part thereof, but to do so said defendant hath hitherto wholly neglected and refused, to the damage of the said People of the State of Illinois in the sum of five thousand dollars, therefore they bring suit, *ect.*

JAS. K. EDSALL,
Attorney-General for Plaintiffs.

80 And afterwards, to wit, on the 12th day of October, in the year last aforesaid, the same being one of the days of the October term of the circuit court of Douglas County, the following among other proceedings were had in said court and entered of record, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
ILLINOIS CENTRAL RAILROAD COMPANY. } Action of debt.

This day come the plaintiffs, by their attorney, and also come the defendant, by its attorney, and by agreement the defendant has until the tenth day of this term to file pleas.

And afterwards, to wit, on the 23rd day of October, in the year last aforesaid, the same being one of the days of the October term of said circuit court, the following among other proceedings were had in said court and entered of record, to wit:

81 THE PEOPLE OF THE STATE OF ILLINOIS
vs.
ILLINOIS CENTRAL RAILROAD COMPANY. } Action of debt.

This day again come the parties herein, by their respective attorneys, and by agreement of the parties, this cause is submitted to the court for trial, without the intervention of a jury, upon agreed statement of facts. Cause taken under advisement by the court, and to stand continued.

82 UNITED STATES OF AMERICA,
State of Illinois, Douglas County, ss:

In the circuit court, March term, A. D. 1875.

Pleas before the honorable Oliver L. Davis, judge of the fifteenth judicial circuit of the State of Illinois, and sole presiding judge, circuit court of Douglas County, in the State aforesaid, and at a term thereof begun and held at the court-house in the city of Tuscola, in said county, on the fifth Monday, (being the 29th day) of March, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the ninety-ninth:

Present, honorable Oliver L. Davis, judge of the 15th judicial circuit

of the State of Illinois, Robert B. MacPherson, State's attorney, Francis G. Cunningham, sheriff.

Attest:

PATRICK C. SLOAN, *Clerk.*

Be it remembered that on the 8th day of April, in the year last aforesaid, the same being one of the regular days of the March term of the circuit court of Douglas County, the following among other proceedings were had and entered of record in said court, to wit:

83 THE PEOPLE OF THE STATE OF ILLINOIS
vs.
ILLINOIS CENTRAL RAILROAD COMPANY. } Action of debt.

This day come the parties herein by their respective attorneys, and this cause having been taken under advisement at the October term, A. D. 1874, and the court being fully advised in the premises, finds the issues for the plaintiffs and assesses a fine of one thousand dollars upon the defendant, and thereupon the defendant moved the court for a new trial, which motion was duly presented and argued by counsel, and by the court overruled and made a part of the bill of exceptions; thereupon the defendant enters a motion in arrest of judgment, which motion is by the court overruled. It is therefore ordered and adjudged by the court that the said plaintiffs have and recover of the said defendant the said sum of one thousand dollars, whereupon the defendant prays an appeal to the su-
84 preme court, which appeal is granted on defendant executing bond to said plaintiffs in the penal sum of two thousand dollars, with George Trumbull and George W. Wall as sureties, conditioned according to law. Bond to be filed within thirty days from rising of court; bill of exceptions presented and signed, which is in words and figures as follows to wit:

Be it remembered that this cause came on to be heard before the court without a jury by consent of parties, and was submitted by the parties upon the stipulations filed herein, which is in the words and figures as follows, that is to say:

It is agreed between the parties to this suit that it be submitted to the court for trial without the intervention of a jury, and upon the part of the defendant it is admitted—

1st. That the defendant charged and collected of the persons named in the 17th count of plaintiff's declaration twenty-eight dollars and thirty-five cents for the transportation of seventy barrels of salt from the city
85 of Chicago, Illinois, to Tuscola, in Douglas County, Illlnois, as alleged in said 17th count.

2nd. That the maximum amount fixed for the transportation of freight of like class and quantity by the railroad and warehouse commissioners of the State of Illinois was before and at the time of such transportation twenty-four dollars and eighty cents, as established by a schedule of rates for the defendant made, subscribed, and published by said commissioners and a table entitled "classification of freight," which schedule of rates and tables of the "classification of freight" were made by said commissioners and were in force before the transportation of said salt mentioned in said count, and were made and published in pursuance of an act of the general assembly of the State of Illinois, approved May 2nd, A. D. 1873,

and in force July 1st, 1873, and entitled "An act to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight on railroads in this State, &c.," and this admission shall have the like force and effect, as if said schedule of rates and tables
86 for the "classification of freight" had been read in evidence on the trial.

3d. That the sum so charged by the defendant for such transportation in said 17th count mentioned, exceeds the rate as previously fixed by said commissioners, in the sum of three dollars and fifty-five cents.

4th. It is admitted by the plaintiff and defendants as follows: That said commissioners in pursuance of the statute have classified the different railroad companies of the State, and have established rates differing according to the classifications thus made, and in so making such classifications the rates established for defendant differ materially from the rates so fixed for some of the other railroads of this State.

5th. That said sum as charged and collected by the defendant was the rate of toll previously directed and determined by a by-law of the board of directors of said defendant in conformity with the provisions of its charter, and so continued to be the rate so established up to and at the time of said shipment.

6th. The printed charter of defendant attached hereto, marked
87 A, approved Feb'y 10th, 1851, being an act passed by the general assembly of the State of Illinois, entitled "An act to incorporate the Illinois Central Railroad Company," is admitted as evidence in this case.

7th. The defendant claims the right to direct and determine its rates of toll for the transportation of freight and passengers by virtue of the provisions of its charter, and insist that the act of the general assembly of the State of Illinois, approved May 2d, 1873, entitled "An act to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight on railroads in this State, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discrimination and extortion with rates to be charged by the different railroads in the State for the transportation of freights on said roads approved April 7th, 1871,'" in so far as it conflicts with the right of the defendant to direct and determine its rates of toll for the transportation of freight and passengers, is in conflict with its charter and the constitution of the State of
88 Illinois, and is repugnant to the Constitution of the United States in this, that it impairs the obligation of said contract entered into between the defendant and the State of Illinois, and is unconstitutional and void.

8th. On the part of the plaintiff it is insisted that said recited act is constitutional and valid.

If, upon the foregoing facts, this court finds for the plaintiff, it is agreed that a fine of 1,000.00 may be assessed by the court; should the court find for the defendant, the judgment is to be entered accordingly. Each party may appeal from the decision, finding, and judgment, of the court.

ANTHONY THORNTON,
Att'y for Pl'ff.

GEO. TRUMBULL,
Att'y for Defendants.

OCT. 19, '74.

Charter of the Illinois Central Railroad Company, marked A, in stipulation of parties.

89 Copy of charter of def'ts marked "A " of stipulations.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

STATE OF ILLINOIS.

Illinois.] Senate. [17 assem.

An act to incorporate the Illinois Central Railroad Company, approved February 10th, 1851.

Whereas, in the judgment of this general assembly, the object of incorporating the Central Railroad Company cannot be attained under general law. Therefore,

SEC. 1. Be it enacted by the people of the State of Illinois, represented in general assembly, that Robert Schuyler, George Griswold, Gouverner Morris, Franklin Haven, David A. Neal, Robert Rantoul, junior, Jonathan Sturges, George W. Ludlow, Thomas W. Ludlow, of New York, John F. A. Sandford, Henry Grinnell, William H. Aspinwall, Leroy Wiley, Leroy M. Wiley, of New York, and Joseph W. Alsop, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be a body politic and corporate by the name and style of the Illinois Central Railroad Company, and under the
90 name and style shall be capable of suing and being sued, in pleading and being impleaded, defending and being defe'ded against in law and equity in all courts and places whatsoever in like manner and as fully as natural persons; may make and use a common seal, and alter or renew the same at pleasure, and by their said corporate name and style shall be capable in law of contracting and being contracted with, shall be and hereby invested with all the powers, privileges, immunities, and franchises of acquiring by purchase or otherwise and holding and conveying real and personal estate which may be needful to carry into effect fully the purposes and object of this act.

SEC. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain, and operate a railroad with one or more tracks or lines of rails from the southern terminus of the Illinois and Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi River opposite
91 the town of Debuque in the State of Iowa.

SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control for the purpose contemplated herein land not exceeding two hundred feet in width through its entire length, may enter upon and take possession of and use all and singular any lands, streams, and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine

houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials, and privileges belonging to the State are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company, or corporation and cannot be obtained by voluntary grant or release, the same may be taken and paid for if any damages are awarded in the manner provided in "An act to provide for a general
92 system of railroad incorporation," approved November 5th, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises, and immunities in said act contemplated and provided: Provided, that the appeal allowed by the provisions of the aforesaid act, approved the 5th of November, 1849, shall not affect the possession by such company of the lands appraised, and when the appeal is made by others than the company, the same shall not be allowed, except on a stipulation of the party appealing that the said company may enter upon and use the land described in the petition for the use and purposes in said petition set forth, upon said company giving bond and security, to be approved by the clerk of said court, that they will pay all costs and damages that may be awarded against said company on the hearing of said appeal: Provided, that nothing in this section contained shall be so con-
93 strued as to authorize the said corporation to interrupt the navigation of said stream.

SEC. 4. The capital stock of said corporation shall be one million of dollars, which may be increased from time to time to any sum not exceeding the entire amount expended on account of said road, divided into shares of one hundred dollars each, which shall be deemed personal property, and may be issued and transferred in such manner and at such places as may be ordered and provided by the board of directors, who shall power to require the payment of sums subscribed by stockholders, in such manner and on such terms as they may deem proper; and on refusal or neglect on the part of stockholders, or any of them, to make payment on the requisition of the board of directors, the share of such delinquent may, after thirty days' public notice, be sold at public auction under such rules as said board of directors may adopt, the surplus money, if any remains after the payment due, with the interest and the necessary costs
94 of sale, to be paid to such delinquent stockholders. The board of directors hereby appointed shall cause books to be opened for subscriptions to said stock in such manner and at such time and places as they shall direct.

SEC. 5. All the corporate powers of said company shall be vested in and be exercised by a board of directors and such officers and agents as they shall appoint. The board of directors shall consist of not less than twelve stockholders, three of whom shall be chosen every year by the stockholders, each share having one vote, to be given in person or by proxy, the governor of the State of Illinois, who shall be a director ex officio, perpetually voting in person or by proxy, each director successively elected to continue in office until his successor is elected and qualified. Vacancies in the board may be filled by a vote of two-thirds of the directors remaining; such appointee to continue in office until the next regular election of di-
95 rectors; but no person shall be so elected who shall not have been openly nominated at a meeting of the directors at least one week

before the time appointed for such election. Other officers, agents, and servants, whether members of the board or otherwise, may be appointed, employed, paid, and dismissed under such rules and regulations as the board may from time to time adopt.

SEC. 6. The following-named persons shall constitute the first board of directors, to wit, Robert Schuyler, George Griswold, Governeur Morris, Franklin Haven, David A. Neal, Robert Rantoul, Jonathan Sturges, George W. Ludlow, John F. A. Sandford, Henry Grinnell, Joseph W. Alsop, Leroy Wiley, with the governor of the State of Illinois, for the time being, whose power shall commence and be in full force from and after the day this act shall be accepted in the manner herein provided.

SEC. 7. The president and directors for the time being are hereby authorized and empowered by themselves, their officers or agents,
96 to execute all the powers herein granted for the purpose of surveying, locating, constructing, completing, altering, maintaining, and operating said road and branches, and for the transportation upon the same of persons, goods, wares, and merchandise, with all such powers and authority of control and management of the affairs of said company as may be necessary and proper to carry into full and complete effect the meaning and intent of this act.

SEC. 8. The said company shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interests of the company; provided, that the same be not repugnant to the Constitution and laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and
97 property upon the same as they shall from time to time by their by-laws direct and determine, and to levy and collect the same for the use of said company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things the use of said road and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall from time to time determine. Nothing in this act contained authorize said corporation to make a location of their track within any city without the consent of common council of said city.

SEC. 9. If any person shall carelessly, wilfully, maliciously, or wantonly delay, hinder, or obstruct the passage of any carriage on said road or branches, or shall place or cause to be placed any material thereon, or in any trespass upon, spoil, injure, or destroy said road or branches, or any part thereof, or anything belonging or pertaining thereto, or em-
98 ployed or used in connection with its location, survey, construction, or management, all persons committing or aiding and abetting in the commission of such trespass or offense shall forfeit and pay to the said company treble such damages as shall be proved before any court of competent jurisdiction; and further, such offenders shall be liable to indictment in the county within whose jurisdiction the offense may be committed, and to pay a fine of not less than thirty nor more than one hundred dollars, to the use of the People of the State of Illinois, or may

be imprisoned in the penitentiary for a term not exceeding five years, in the discretion of the court before whom the same may be tried.

SEC. 10. Said corporation may construct their said road and branches over or across any stream of water, water-course, highway, railroad, or canal which the route of its road shall intersect, but the corporation shall restore the stream or water-course, road or highway thus inter-
99 sected, to its former state, or in sufficient manner not to have impaired its usefulness. Whenever the track of said railroad shall cross a road or highway such road or highway may be carried under or over said track as may be found most expedient; and in case where an embankment or cutting shall make a change in the line of such road or highway desirable, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such roads or highway as may be deemed requisite by said corporation. Unless the lands so taken shall be purchased or voluntarily given for the purposes aforesaid, compensation therefor shall be ascertained in the manner in this act provided as nearly as may be, and duly made by said corporation to the owners and persons interested in such lands; the same, when so taken and compensation made, to become a part of such intersecting road or highway, in such manner and by such tenure as the adjacent parts of the same highway may be held for highway purposes.

100 SEC. 11. And when the route of said road, or either of its branches, as provided in this act, shall intersect, cross, or connect with or run along or upon the line of any other railroad now constructing or now in process of construction by any other company, the company to be formed under this act shall join with such other company in making all necessary turnouts, sidelings, and switches, and other conveniencies necessary to further the objects of such connection; and when the route of any other company shall be occupied as aforesaid, just compensation shall be made to such other company for all expenditures made by them in the location of such road; and all railroads so constructed or now in process of construction, intersected as aforesaid, and connections made with the roads authorized to be built by this act, shall be made, and facilities in the transhipment of freight and passengers and interchange of cars afforded by each over the respective roads upon fair and equitable terms; and in case the said companies cannot agree upon the amount of
101 compensation to be made therefor, or the points, and manner of such crossings and connections, the transhipment of freight and passengers, and interchange of cars, the same shall be ascertained and determined by three commisssoners, one to be chosen by each of said companies, and the two so chosen to choose a third, and in case they cannot agree upon the choice of a third person, he shall be appointed by the judge of the district court of the United States for the district of Illinois; and the decision of the three, when so chosen, shall be final; provided, that this corporation shall not take and run on the road or line of any such company which is now being constructed without the consent and agreement of the company whose road or line is proposed so to be used.

SEC. 12. Every conductor, baggage-master, engineer, brakeman, or other servant of said corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office, the initial letters or style of the corporation. No conductor or

collector without such badge shall demand or be entitled to receive
102 from any passenger any fare, toll, or ticket, or exercise any of the powers of his office, and no other of said officers or servants without said badge shall have any authority to meddle or interfere with any passenger, his baggage, or property. In forming passenger trains, baggage or freight or merchandise or lumber cars shall not be placed in rear of passenger cars, and if they or any of them shall be so placed, and any accident shall happen to life or limb, the officer or agent who so directed or knowingly suffered such arrangement and the conductor or engineer of the train shall each and all be held guilty of a misdemeanor and be punished accordingly.

SEC. 13. A bell of at least thirty pounds weight, or a steam whistle, shall be placed upon each locomotive engine, and shall be rung or whistled at the distance of at least eight rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said corporation,
103 one-half thereof to go to the informer and the other half to the State, and to be liable for all damages which shall be sustained by any persons by reasons of such neglect. Said corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained, across each public road or street where the same is crossed by the railroad, on such elevation as not to obstruct the travel, and to be easily seen by travellers, and on each side of said board shall be printed in capital letters of at least the size of nine inches each the words "Railroad crossing! Look out for the cars," but this provision shall not apply to streets or cities or villages unless the corporation be required to put up such board by the officers having charge of such streets.

SEC. 14. Said corporation shall, within a reasonable time after said road and branches shall have been located, cause to be made a map and profile thereof, and of the land taken and obtained for the use of such
104 road and branches, and file the same in the office of the secretary of state, and also like maps of the parts thereof located in the different counties through which the same may pass, and cause the same to be recorded in the office for recording deeds in the county in which said parts of said road and branches shall lie.

SEC. 15. For the purpose of securing the construction of said road and branches, the right of way and all the lands which may be selected along the lines of said road and branches within this State under the grant made by the Government of the United States to the State of Illinois, by virtue of "An act granting the right of way and making a grant of lands to the State' of Illinois, Mississippi, and Alabama, in aid of the construction of a railroad from Chicago to Mobile," passed September twentieth (20), eighteen hundred and fifty (1850), and also the right of way which the State of Illinois has heretofore obtained along and on the line of said railroad and branches as heretofore located and surveyed for the uses
105 of the same, as well as *well as* the lot of ground obtained by the State within the city of Cairo, for a depot, and all the grading, embankments, excavations, surveys, work, materials, personal property, profiles, plats, and papers constructed, procured, furnished, and done by or in behalf of the State of Illinois for or on account of said road and branches;

also the right of way over and through lands owned by the State, are hereby ceded and granted to said corporation for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining, and operating said road and branches, as in this act provided, and in the manner following, that is to say: Immediately upon the organization of said company and the presentation to the governor of the State of Illinois of a certificate of signed by the corporators hereinbefore named, and duly acknowledged, accepting of this act of incorporation and certifying to the due organization of said corporation, to the subscription to the capital stock thereof by the corporators hereinbefore named
106 and the associates, of the sum of one million of dollars, and the bona fide payment of twenty per cent. thereon to the treasurer of said company, verified by the affidavit of the president and treasurer of said company (which certificate shall be filed in the office of the secretary of state); and after three hundred thousand dollars of registered canal bonds or funded internal improvement bonds of the State of Illinois, or two hundred thousand dollars in specie or two hundred thousand dollars in six per cent. United States stock shall have been by said corporation deposited with the treasurer of the State of Illinois, which shall be safely preserved and kept in the treasury of said State, upon the faith of the same to be returned to or paid over to said corporation, according to the provisions of the said charter, the said governor of the State of Illinois shall, in his official capacity, and in behalf of the State of Illinois, and under the great seal thereof, execute and deliver to said company a deed in fee-simple of said lands granted by the Government of the United States under the act of Congress aforesaid, said depot at Cairo, right of
107 way, grading, embankments, excavations, surveys, work, materials, profiles, plats, and papers hereinafter described and set forth, or in any way appertaining to said road and branches; provided, that said company shall, simultaneously with the execution of said deed by said governor, execute a deed of trust to the persons and for the purposes hereinafter named and expressed; and provided, further, that the deed in fee-simple, to be executed by the governor as aforesaid, shall recite at full length the act of Congress aforesaid, this act, and the deed of trust aforesaid. Said of trust shall be executed to Morris Ketchum, John Moore, and Samuel D. Lockwood, as trustees, and shall include and convey to said trustees and their successors everything included and conveyed in and by said deed in fee-simple, and in addition thereto the railroad or railroads which may be built upon or along said track or tracks, line or lines, and materials for the construction thereof, with all and singular the buildings, shops, engine-houses, turnouts, stations, and real estate
108 of every nature and description belonging or to belong to or in any way appertaining or to appertain to said road and branches, for the uses, trusts, and purposes following, that is to say:

First. To secure and guarantee to the State of Illinois the first and prior lien on everything conveyed by said deed of trust, of every name, character, and description for security, as follows:

Firstly. The construction, completing, and furnishing said road and branches in the manner and time and upon conditions in this act provided.

Secondly. For the faithful application of all moneys or property arising from the sale of lands, or obtained upon the faith of the same, as hereinafter authorized, to the construction, equipping, and furnishing said road and branches, in accordance with the terms of this act and said act of Congress.

Thirdly. The indemnification of the State of Illinois against all and every claim of the United States Government, for proceeds of
109 sale of lands made by said company under the provisions of this act, in the event said road and branches shall not be completed, as required by the act of Congress above referred to.

Fourthly. The lien hereby created shall take and have precedence of all demands, incumbrances, mortgages, bonds, judgments, and decrees, against said corporation of said property, except so far as the absolute power of selling said lands or any portion thereof is herein provided for; provided, that in case fifty miles of the said road shall be constructed according to the provisions of this act, within two years from and after the date of the organization of the company under the same, the bonds or money herein provided to be deposited with the treasurer of the State of Illinois shall become forfeited and become the property of the said State, subject to the disposition of the legislature thereof.

Second. That on its organization said company may enter upon,
110 take, and receive possession of the said tracks or lines for the purpose of surveying, locating, working, and constructingsaid road and branches, with the right of way, land, grading, embankments, excavations, surveys, works, materials, property, profiles, plats, and papers aforesaid, to be occupied, used, and employed for the purposes contemplated by this act, under whosoever control the same may be.

Third. That said company shall proceed to locate, survey, and lay out, construct, and complete said road and branches through the entire length thereof, the main trunk thereof or central line to run from the city of Cairo to the southern termination of the Illinois and Michigan Canal, passing not more than five miles from the northeast corner of township twenty-one north, of range two east of the third principal meridian, and nowhere departing than seventeen miles from a straight line between the city of Cairo and said southern termination of said canal, with a
111 branch running from the last mentioned point upon the most eligible route to the city of Galena; thence to a point on the Mississippi River opposite the city of Debuque, in the State of Iowa, with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route into the city of Chicago, on Lake Michigan; that the central road or main track shall be completed with at least one line of rails or single track, with necessary turnouts, stations, equipments and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the same date; said roads to be made equal in all respects to the roads leading from Boston to Albany, usually known as the Great Western Railway, with such improvements as experience shall have shown to be expedient; the central or main line to be commenced and to be continued to completion.

112 Fourth. A portion of said lands so conveyed to said trustees, not exceeding one-fourth part thereof in value, to be designated by

said company, shall be held by said trustees free from all incumbrances for purposes of sale from time to time on the requisition of said company for the purposes of raising funds for the payment of interest on loans in case of deficiency from other sources, and for such expenditures as the exigencies of the business of the company may require; provided that no portion of said fourth part of said lands shall be sold until said road and branches shall have been surveyed and located and the work actually commenced on the main road; provided further, that no portion of said land so held by said trustees, free from all incumbrances for said purposes, shall be sold or offered for sale until the said trustees shall be satisfied that a sum of money has been actually expended upon the construction of a section of at least fifty miles of said road adjacent to said lands, equal in amount to the sum of money to be raised from the sales of such portions of said lands, or until a section of at least fifty miles of said road adjacent to said lands shall have been completed, when the lands on
113 said section will be sold, and so on till the said road and branches shall have been completed.

Fifth. For the purpose of raising funds from time to time for the construction and completion of said road and branches, and the purchase of iron and other materials to be used thereon, said company may issue its bonds, countersigned by the said trustees, in sums of not less than five hundred, nor more than one thousand dollars each, at *reights* of interest not higher than seven per cent. per annum, payable semi-annually; the principal of said bonds payable in the year one thousand eight hundred and seventy-five or sooner, at the pleasure of the company, at such place as it shall designate. The payment of said bonds shall be secured by the deed of trust aforesaid of said lands, roads, and materials as hereinbefore provided, subject nevertheless to the prior lien of the State upon said lands and property hereinbefore provided for, which said lien shall be referred to and recited in said bonds so to be issued by said company; provided that the faith of the State is in no wise pledged for the redemp-
114 tion of said bonds to any extent.

SEC. 16. When the said company shall have completed and put in running order fifty miles of said road the said trustees, on the requisition of said company, may proceed to sell the lands lying along and adjacent to such section so completed (and not reserved free from all incumbrances aforesaid) in such manner as the company may direct. Said lands shall be sold for cash in hands, or the bonds of said company at par. All bonds received on such sales shall be cancelled by said trustees and delivered to said company. The trustees shall invest all moneys received on such sales in the bonds of the company, which shall be in like manner cancelled and returned. On cancelling said bonds, and before returning them to the company, said trustees shall make a brief memorandum on each bond, specifying for or on what particular tract or tracts of land the same was received. On making such sales and receiving the price of such lands in money or bonds as aforesaid, said trustees shall convey such tracts
115 by an absolute title in fee-simple to the purchaser, which conveyance shall operate as a release or an acquitance of the particular tract or tracts so sold from all liability or incumbrances on account of said deed of trust and the issue of said bonds so specified in the preceeding section, so as to vest in the purchasers complete and indefeasible title. Be-

fore any sales shall be made of any of said lands the said trustees shall make a complete record, describing each and every tract of land selected under said act of Congress, a copy of which record shall be filed in the office of the auditor of the State, and as sales of land are made as provided herein, from time to time, the said trustees shall make and keep a record as aforesaid of every and each tract of land so sold, together with the name of the person to whom and the price for which the same was sold, a copy of which record of sales shall be filed in said auditor's office semi-annually.

SEC. 17. The trustees shall not at any time during the construc-
116 tion of said road and branches sell or dispose of lands to an amount exceeding the sum which shall then have actually been expended upon the said work, but may at the request of the company sell as the work progresses, so as to meet expenditures actually made on the sections of road completed, as far as the receipts from said sales may go towards their liquidation. And all lands remaining unsold at the expiration of ten years after the completion of said road and branches shall be offered at public sale annually until the whole is disposed of, and the avails applied to the payment of the outstanding bonds of the company as aforesaid; or if no such bonds be outstanding said avails shall be paid to said company.

SEC. 18. In consideration of the grants, privileges, and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Monday of December and June in each year, pay into the treasury of the State of Illinois five per centum on the gross or total proceeds, or receipts or income derived from said road and branches
117 for the six months then next preceding, the first payment of percentage on the main trunk of said road to commence four years from the date of said deed of trust, and on the branches six years from the date aforesaid, unless said road and branches are sooner completed, then from the date of completion. And for the purpose of ascertaining the proceeds, receipts, or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the State of Illinois; the truth of which account shall be verified by the affidavits of the treasurer and secretary of said company.

And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the State of Illinois, or any other person by law appointed to examine the books and papers of said corporation, and to examine under oath the officers, agents, and employees of said company, and other persons. And if any person so examined by the governor or other authority shall knowingly and
118 wilfully swear falsely, of if the officers making such affidavits shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury.

SEC. 19. The selection of lands provided for in the act of Congress making the grant hereinbefore specified shall be made by said company, or such agents as it may designate under the appointment of the governor of this State, subject to the approval in said act specified. Said selection, as well as the survey, location, and completion of said road and branches, and the compensation of such trustees, shall be at the cost and charges of said company, without charge of any kind upon the treasury of the State of Illinois. Said road and branches to be free for the use of the United

States, and to be employed by the Post-Office Department, as provided in said act of Congress.

SEC. 20. In case of the death, resignation, removal, or inability to act of either or all of said trustees, the vacancy or vacancies shall be
119 filled by the governor of the State of Illinois and said company alternately, the governor filling the first vacancy that may occur.

SEC. 21. The corporation authorities of any city or cities on the line of said road or branches, or at either terminus thereof, or any owner or owners of property in such city, or any association of citizens duly authorized by any such corporation, shall have power to lay down or construct a track or railroad along any of the streets of any such cities for the purpose of conveying property to and from said railroad, which may be consigned to any of the warehouse men in any of said cities; that said track or railroad (under the direction of said company) may intersect the track of said railroad company at or near the main depot in said cities respectively; and said company shall at all times permit the owners or consignees of property in such cities to take the cars containing the property to them consigned to their respective warehouses upon said track; provided, that
120 any car so taken shall be returned without any unnecessary delay; and provided further, that whenever it shall be necessary for the convenience of the public or persons receiving or sending property by said railroad, the said company shall permit side track to intersect their main road at any depot on or along the line of said road; and that such persons shall be entitled to have any property taken from such side track under the directions and regulations of said company without unreasonable delay; and for the non-performance by said company of any act of this provision required to be done said company shall forfeit and pay to the party aggrieved the sum of fifty dollars in each case, to be received in an action of debt before any justice of the peace, or any court having jurisdiction thereof.

SEC. 22. The lands selected under said act of Congress and hereby authorized to be conveyed shall be exempt from all taxation under the laws of this State until sold or conveyed by said corporation or trustees,
121 and the other stock, property, and effects of said company shall be in like manner exempt from taxation for the term of six years from the passage of this act. After the expiration of said six years the stock, property, and assets belonging to said company shall be listed by the president, secretary, or other proper officer with the auditor of State, and an annual tax for State purposes shall be assessed by the auditor upon all the property and assets of every name, kind, and description belonging to said corporation. Whenever the taxes levied for State purposes shall exceed three-fourths of one per centum per annum such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the State, and the said corporation is hereby exempted from all taxation of every kind except as herein provided for. The revenue arising from said taxation and the said five per cent. of gross or total proceeds, receipts, or income aforesaid shall be paid into the State treasury in money and applied to the payment of interest, paying State in-
122 debtedness until the extinction thereof; provided, in case the five per cent. provided to be paid into the State treasury and the State taxes to be paid by the corporation do not amount to seven per cent. of

the gross or total proceeds, receipts, or income, then the said company shall pay into the State treasury the difference so *to* as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation.

SEC. 23. This act and all grants herein contained shall cease and be void unless accepted by said company within sixty days after the passage of this act, and immediately on such acceptance, made in the manner above provided the deed in fee-simple, and the deed of trust aforesaid shall be made as above provided. All the grants herein contained shall cease and be void unless said road and branches be surveyed and located and work on the main trunck actually begun before the first day of January, 1852.

123 SEC. 24. The State shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes, and dues which may accrue to the State from said corporation as herein provided, which lien of the State shall take precedence of all demands, judgments, or decrees against said corporation.

SEC. 25. That each and every person who on the twentieth day of September, one thousand eight hundred and fifty, was the owner of any improvements made previous to that date, or any lot of land conveyed to the said company, and who became such owner with a view to a residence on or occupation of such lot of land for agricultural purposes, shall have the right to purchase, at not exceeding two dollars and fifty cents per acre, a quantity of the lot so owned, to be bounded by the legal subdivisions, not exceeding one quarter section, to consist of the quarter quarter, half quarter, or quarter section, which will include the improvements aforesaid; provided, that any person claiming the right to purchase under

124 the provisions of this act shall, within the three months from the date of selecting the lands, file in the clerk's office of the circuit court of the county in which the land claimed is situated a notice to the said trustees and corporation of his or their claims, describing the land by its numbers, accompanied with an affidavit stating the date and object of the improvement, the time and manner when and how he, she, or they became the owner thereof, and also the affidavits of at least two residents of the county proving the facts in relation to such claim; and provided further, that the right of way upon and across any lot sold under the provisions of this section shall be reserved and retained for the passage of the road as the same may be located and constructed, and any person claiming the right to purchase as aforesaid shall, within twelve months from the date of commencing the work on the road within the county in which the land is situated, pay the said trustees, or the corporation, the consideration money for the land claimed, which payment shall entitle him, her, or them to a deed conveying an estate in fee; but in case of failure to make

125 such payment the right to make the purchase shall cease. When two or more persons claim the right to purchase the same lot of land and file the proof of ownership as herein required, the person proving the first residence by himself or those under whom he claims the improvement shall have the right to make the purchase, but no sale or conveyance of any lot of land under the provisions of this section shall affect the rights or equities of parties claiming the same as between each other.

SEC. 26. In case the person' incorporated by this act shall fail or neg-

lect to accept the provisions of the same and comply with its conditions within the time and in the manner herein prescribed, then the same may be accepted by any other company which shall be approved of by the governor, auditor, and treasurer of this State, who, upon complying with the terms and conditions of this act, shall be vested with all the rights,
powers, and immunities conferred upon the corporators herein
126 named, and shall be subject to all the liabilities in the said act set forth in as full, ample, and complete a manner as if their names were inserted as corporators in this act.

SEC. 27. This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed and declared in all courts and places whatsoever, and shall be in force from and after its passage.

SIDNEY BREEZE,
Speaker of the House of Representatives.
WILLIAM McMURTNEY,
Speaker of the Senate.

Approved February 10, 1851.

AUG. C. FRENCH.

Certificate of act, with the seal of the State of Illinois.

DAVID Q. GREGG,
Secretary of State.

To his excellency AUGUSTUS C. FRENCH,
Governor of the State of Illinois:

The Illinois Central Railroad Company hereby certify and de-
127 clare that they have accepted and do hereby accept this act of incorporation of said company, entitled "An act to incorporate the Illinois Central Railroad Company," passed and approved on the tenth day of February, one thousand eight hundred and fifty-one. And this certfiicate is presented in compliance with the requirements of said act, and particularly of the twenty-third section thereof.

In witness whereof and in pursuance of a resolution of the board of directors passed on the nineteenth day of March, one thousand eight hundred and fifty-one, the said Illinois Central Railroad Company have caused the corporate seal to be hereto affixed, and the names of their president and secretary to be signed to this certificate this twenty-second day of March, one thousand eight hundred and fifty-one.

[SEAL.] ROBERT SCHUYLER,
President Illinois Central Railroad Company.
S. ALOSSEN,
Secretary Illinois Central Railroad Company.

128 And the court, after consideration hereof, found the issues for the plaintiff, and assessed a fine of $1,000.00 against the def't, to which findings and assessment the def't then and there excepted, and def't then moved for a new trial therein, as follows:

STATE OF ILLINOIS,
Douglas County, ss

In the circuit court, March term, 1875.

THE PEOPLE, &C., }
vs. } Debt.
I. C. R. R. Co. }

The def't moves the court for a new trial herein, because—

1st. The finding is contrary to law.

2nd. The finding is contrary to evidence.

3rd. The finding is contrary to law and evidence.

4th. The said act referred to on the 2nd clause of the stipulations is void so far as it conflicts with the right of def't under the charter to fix the rates referred to and charged by def't.

5th. The said act, so far as it authorized said commissioners to make the said schedule, is void.

129 6th. The said act, so far as it makes the said schedules evidence for the purpose indicated in said act, or for any purpose involved herein, is void.

7th. The said schedules are void because they are not uniform on all roads in the State, and for other reasons, and are not proper evidence in this cause for any purpose.

8th. The said act, so far as it fixes penalties for the violation of its premises, is void.

9th. The penalties fixed by said act are not proportionate to the offense, and therefore cannot be enforced.

10th. The said act is generally unconstitutional and void; wherefore, and for divers other sufficient reasons appearing herein, &c.

GEO. W. WALL,
Att'y for Def't.

Which motion was by the court overruled, to which def't then and there excepted.

And the def't moved an arrest of judgment, which motion was by the court overruled, and the def't then and there excepted.

And the court having entered judgment, to which def't then and
130 there excepted, the said def't prayed an appeal to the supreme court of Illinois, which prayer was granted upon filing bond in the sum of $2,000.00, with Geo. Trumbull & Geo. W. Wall as security, to be filed within thirty days. And now the def't brings the bill of exceptions, and prays that the said may be signed and sealed and made a part of the record, and it is done accordingly.

O. L. DAVIS,
Judge of the Circuit Court of Douglas County, &c.,
15th Judicial Circuit.

And afterwards, to wit, on the 15th day of April, in the year last aforesaid, said defendant, by its attorney, filed in said clerk's office its certain appeal bond, which is in words and figures as follows, to wit:

131 Know all men by these presents that we, Illinois Central Railroad

Company, Geo. Trumbull & Geo. W. Wall, of the county of , and State of Illinois, are held and firmly bound unto The People of the State of Illinois in the penal sum of two thousand dollars, for the payment of which well and truly to be made we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at this 14th day of April, in the year of our Lord one thousand eight hundred and seventy-five.

The condition of the above obligation is such that whereas the said People of the State of Illinois did on the 8th day of April, one thousand eight hundred and seventy-five, at a term of circuit court then being holden within and for the county of Douglas and State of Illinois, obtain a judgment against the above bounden Illinois Central Railroad Com-
132 pany for the sum of one thousand dollars and cents, and costs of suit, from which judgment the said Illinois Central Railroad Company has prayed for and obtained an appeal to the supreme court of said State:

Now, if the said Illinois Central Railroad Company shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment costs, interest, and damages rendered and to be rendered against Illinois Central Railroad Company the said appellant, in case the said judgment shall be affirmed in the said supreme court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE ILLINOIS CENTRAL RAILROAD,
By JOHN M. DOUGLAS,
Acting President.

JOHN M. DOUGLAS. [SEAL.]
GEO. TRUMBULL. [SEAL.]
GEO. W. WALL. [SEAL.]

133 I, Patrick C. Sloan, clerk of the circuit court of Douglas County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all the proceedings of record in a certain cause lately pending in said court, on the common-law side thereof, wherein The People of the State of Illinois were plaintiffs and The Illinois Central Railroad Company, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Tuscola, this 10th day of July, 1875.

{ SEAL OF CIRCUIT COURT OF DOUGLAS COUNTY. } PATRICK C. SLOAN, *Clerk.*

134 And now come the said appellant and shows to the court that in the said record and proceedings there is manifest error, and by way of assigning the same said appellant—

Errors assigned.

1st. The court erred in finding the issues for plaintiff.

2d. The court erred in refusing a new trial.

3r' The declaration is fatally defective in not averring that the commissioners had prepared and published schedules, &c., in pursuance of the act

referred to in the stipulation, and that the rates charged by defendant were in excess of the rates fixed by such schedules.

4th. The said act so far as it authorizes the said commissioners to make the said schedule is void as against appellant.

5th. The said act so far as it makes the said schedule evidence for the purpose indicated in said act or for any purpose involved herein, is void as against the appellant.

135 6th. The said schedules are void because they are not uniform on all roads in the State, and for other reasons, and are not proper evidence in the cause for any purpose.

7th. The said act, so far as it fixes penalties, is void because said penalties are not in proportion to the offense.

8th. The act is void so far as it conflicts with the right of appellant under the charter to fix the rates referred to and charged by appellant.

9th. Said act impairs the obligation of the contract between appellant and appellee, and is in conflict with sec. 14, article 2, of the State constitution, also in conflict with the provision of the separate section thereof in reference to appellant, and is unconstitutional and void.

10th. Said act impairs the obligation of the contract between appellant and the State of Illinois, and is in violation of the provisions of sec. 10, article 1, of the Constitution of the United States, and is
136 unconstitutional and void as to appellant.

11th. Said act is in violation of the State constitution, article 2, sec. 2, which declares that no person shall be deprived of life, liberty, or property without due process of law, and of the same provision in the Constitution of the United States, amendment XIV, sec. 1.

12th. Said act as against appellant is otherwise unconstitutional and void.

Wherefore appellant prays that said judgment may be reversed, &c.

GEO. TRUMBULL,
GEO. W. WALL,
For Appellant.

137 And be it remembered that afterwards, to wit, on the 25th day of January, A. D. 1876, the following proceedings in said cause were had in said supreme court, to wit:

ILLINOIS CENTRAL RAILROAD CO. *vs.* THE PEOPLE, &C. } 20. P. D. Appeal from Douglas.

On this day comes the said appellant, by its att'y, and moves the court for an extension of time to file reply herein, and the court being sufficiently advised in the premises, it is ordered that the time be extended 30 days to file its reply herein, and taken on call by the court.

And be it further remembered that afterwards, to wit, on the 25th day of June, A. D. one thousand eight hundred and eighty, there was filed in the office of the clerk of the said supreme court for the central grand division an opinion of said court, which is in words and figures as follows, to wit:

138 And be it further remembered that afterwards, to wit, on the

12th day of June, in the year of our Lord one thousand eight hundred and eighty, an order was made by said court in words and figures following, to wit:

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } Appeal from Douglas.

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters
139 and things herein assigned for error. And it is further considered by the court that the said appellees recover of and from the said appellant costs by them in this behalf expended, and that they have execution therefor.

And be it further remembered that on the 12th day of June, A. D. 1880, an opinion was filed in the office of said clerk of said court, which is in words and figures as follows, to wit:

140 ILLINOIS CENTRAL RAILROAD CO.
vs.
THE PEOPLE, &C.

Opinion of the court by Mr. Justice Dickey.

This is an action against the Ill. Cent. R. R. Co. under the statute of this State, of May 2nd, 1873, "to prevent extortion and unjust discrimination," &c. Judgment was rendered against the defendant for $1,000, and defendant appeals.

It is insisted that the count in the declaration under which judgment was given is defective. The case was by agreement tried upon an agreed state of facts set out in the record, to which is added the following:

"If upon the foregoing facts this court finds for plaintiff, it is agreed that a fine of $1,000 may be assessed by the court, and should the court find for defendant, the judgment is to be entered accordingly."

There was no plea filed. Both parties submitted the case on the agreed statement of facts under the 17th count of the declaration.

I am directed by the court to say that a majority of the court
141 think the count in question is sufficient to sustain the judgment.

The proofs in the record show clearly a violation of the statutes, and the only question as to the propriety of the judgment depends upon the constitutional power of the general assembly to pass the law.

It is insisted that the act is in violation of a contract between the State and the corporation growing out of the granting and accepting of the charter of the appellant.

The charter provides that "the board of directors shall have power to establish such rates of tolls for the conveyance of persons and property upon the same (the road) as they shall from time to time by their by-laws direct and determine, and levy & collect the same for the use of said company," and in consideration of the grants, privileges, and franchises conferred, it is declared the corporation shall pay into the State treasury a certain per cent. of its earnings.

It is insisted by appellants that the statute regulating these tolls is a violation of this contract.

142 This depends upon the construction of the terms of the charter. Without a charter the corporation had no capacity to do any business whatever, no power to make contracts, to sue or be sued.

~~On that end of the shaft F that has its bearings in the side piece C is~~ This charter confers these functions and prescribes the mode of their exercise. A natural person having permission to cross public highways and owning the land necessary may, without a charter, construct and operate a railroad, and has "power to establish such rates of tolls for the conveyance of persons and property upon the same" as he may from time to time determine, and may levy & collect the same for his own use. He is not, however, beyond or above the legislative power of the State to pass laws prohibiting and punishing extortion and within reasonable limits to define what shall be deemed extortion.

The charter of this corporation is beyond a doubt a contract under the adjudged cases in this and other States, by which the corporation

143 acquires the powers and functions to transact such business in the mode prescribed, but it is the opinion of a majority of the court that all this is by necessary implication subject as all citizens are to the legislative power of the State to define, prohibit, and punish extortion. The reasons and authorities leading to this conclusion are presented and discussed in the case of Ruggles v. The People, 91 Ill., 255–6, & this case must be governed by that.

The judgment must be affirmed. The writer of this opinion did not concur in the decision in that case, and does not concur in this.

Judgment affirmed.

144 And afterwards, to wit, on the 30th day of June, A. D. 1880, there was filed in the office of said clerk of the Supreme Court a writ of error from the circuit court of the United States, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Illinois before you, or some of you, being the highest court of law or equity of the said State in which the decision could be had in the said suit, between the Illinois Central Railroad Company, appellant, and the People of the State of Illinois, appellee, wherein was drawn in question the validity of the statute of the State of Illinois, approved May 2nd, A. D. 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged

145 for the transportation of passengers and freights on railroads in this State and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this State for the transportation of freight on said roads,' approved April 7th, A. D. 1871," on the ground that it is repugnant to the first clause of the tenth section of article one (1) of the Constitution of the United States, and the decision of the court was in favor of the validity of said statute, and the right of said appellant depended upon the validity or invalidity of said statute, and the decision was adverse to the rights claimed by said appellant, a manifest error hath happened, to the great damage of said Illinois Central Railroad Company, as by its complaint appears; we, being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,
146 that then, under your hand and seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 28th day of June, in the year of our Lord one thousand and eight hundred and eighty.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

147 On which was indorsed the following: "Illinois Central Railroad Company vs. The People of the State of Illinois. Writ of error."

And afterwards, to wit, on the 30th day of June, A. D. 1880, there was filed in the office of said clerk of the supreme court a bond, which is in words and figures as follows, to wit:

Supreme Court of the United States.

ILLINOIS CENTRAL RAILROAD COMPANY, plaintiff in error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS, defendant in error.

Know all men by these presents that the Illinois Central Railroad Company, a corporation of the State of Illinois, and W. K. Ackerman, of the city of Chicago, in said State, are held and firmly bound unto the
148 People of the State of Illinois in the sum of three thousand dollars, to be paid to the said The People of the State of Illinois, to which payment, well and truly to be made, the said Illinois Central Rail-

road Company binds itself and its successors, and the said W. K. Ackerman binds himself, his heirs, executors, and administrators jointly and severally firmly by these presents. In witness whereof the said Illinois Central Railroad Company has caused these presents to be executed in its name by its president, and its corporate seal to be hereunto affixed, and the said W. K. Ackerman has hereunto set his hand and seal, this 28th day of June, A. D. 1880.

Whereas the said Illinois Central Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the supreme court of Illinois:

Now, therefore, the condition of the above obligation is such, that if the said above-named Illinois Central Railroad Company shall prose-
149 cute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] THE ILLINOIS CENTRAL R. R. CO.,
By W. K. ACKERMAN, *Pres't.*
W. K. ACKERMAN. [L. S.]

Approved June 28, 1880.

T. LYLE DICKEY,
Chief Justice S. C. Ill.

On which bond was indorsed the following: "Illinois Central Railroad Company vs. The People of the State of Illinois. Bond."

Also the following:

STATE OF ILLINOIS, *ss:*

Upon the filing of this bond with the clerk of the supreme court of Illinois (for the central grand division) in his office at Springfield, Illinois, let the writ of error to be sued out in this case to the Supreme Court of the U. S. be made a supersedeas. Done at Chicago this 28th day of June, 1880.

T. LYLE DICKEY,
Chief Justice of the Supreme Court of Ill.

150 And afterwards, to wit, on the 30th day of June, A. D. 1880, there was filed in the office of said clerk of the supreme court a citation, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss*:

To the people of the State Illinois, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Illinois, central grand division, in a cause lately pending therein, wherein the Illinois Central Railroad Company was appellant and you were defendant, to show cause, if any there be, why the judgment rendered against the said appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable T. Lyle Dickey, chief justice of the su-
151 preme court of Illinois, this 28th day of June, in the year of our Lord one thousand eight hundred and eighty.

T. LYLE DICKEY,
Chief Justice of the Supreme Court of Illinois.

On which was indorsed the following, to wit: "Illinois Central Railroad Company vs. The People of the State of Illinois. Citation."

On which was also indorsed the following:

"I do hereby accept service of the within citation this 28th day of June, A. D. 1880.

"J. K. EDSALL,
"*Attorney-General of Ill.*"

152 And afterwards, to wit, on the 30th day of June, A. D. 1880, there was filed in the office of the said clerk of the supreme court, a certificate, which is in the words and figures following, to wit:

Supreme court of Illinois, central grand division. In vacation, after June term, A. D. 1880.

ILLINOIS CENTRAL RAILROAD COMPANY, appellant, *vs.* THE PEOPLE OF THE STATE OF ILLINOIS, appellees.	Appeal from Douglas County.

I do hereby certify that in the above-entitled cause there was drawn in question the validity of a statute of the State of Illinois, approved May 2nd, A. D. 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this State, and to punish the same and
153 prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discrimination and extortions in the rates to be charged by the different railroads in this State for the transportation of freight on said roads,' approved April 7th, A. D. 1871," on the ground that it is repugnant to the first clause of the tenth section of article one (1) of the Constitution of the United States; that the decision of the court was in favor of the validity of said statute, and that the rights of the said appellant in said cause depended upon the validity or invalidity of said statute, and that the decision of the court was adverse to the rights claimed by said appellant; that the judgment in said cause is final, and was rendered by the highest court of the State of Illinois having jurisdiction of the controversy, and application having been made to the chief justice of the supreme court of Illinois by the said appellant, that a writ of error be allowed to issue from the Supreme Court of the United States for
154 the purpose of causing the record and proceedings in said cause to be sent to the Supreme Court of the United States, it is ordered that said writ of error be allowed to issue.

June 28th, A. D. 1880.

T. LYLE DICKEY,
Chief Justice of Supreme Court of Illinois.

On which certificate was indorsed the following, to wit, "Iliinois Central Railroad Company vs. The People of the State of Illinois. Certificate."

155 I, E. A. Snively, clerk of the said supreme court for the central grand division of the State of Illinois, do hereby certify that the foregoing is a complete, true, and correct copy of the record filed in said cause, together with all the proceedings had in said cause in said supreme court, as the same appears of record and files of my office.

In testimony whereof, I hereunto set my hand and the seal of said supreme court, at Springfield, this 30th day of June, A. D. 1880.

[SEAL.] E. A. SNIVELY,
Clerk Supreme Court.

156 In the Supreme Court of the United States, October term, A. D. 1880.

ILLINOIS CENTRAL RAILROAD COMPANY, plaintiff in error, *vs.* THE PEOPLE OF THE STATE OF ILLINOIS, defendants in error.	Error to the supreme court of Illinois.

And afterwards, to wit, at the October term, A. D. 1880, of the said Supreme Court of the United States, before the justices thereof, comes the Illinois Central Railroad Company, plaintiff in error in the above-entitled cause, by Jno. N. Jewett, its attorney, and says that in the record and proceedings in said cause and in the rendition of the judgment therein by the said supreme court of the State of Illinois, manifest error hath intervened to the prejudice of the said plaintiff in error in this to wit:

1st. The said supreme court of Illinois erred in deciding that the act of the general assembly of the State of Illinois, approved May 2d, 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on
157 railroads in this State, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in the State for the transportation of freights on said roads,' approved April 7th, A. D. 1871," as applied to said plaintiff in error, was not in violation of the charter rights and contract of said plaintiff in error, and therefore not void on account of repugnancy to the 1st clause of the 10th section of Art. I of the Constitution of the United States prohibiting the States from passing any law impairing the obligations of contracts.

2d. The said supreme court of the State of Illinois erred in holding that the provisions of the act of the general assembly of the State of Illinois aforesaid, approved May 2d, 1873, and the authority thereby attempted to be given to the railroad & warehouse commissioners of said State to fix the rates of charges for the transportation of freight & passengers on the different railroads of said State, was not in violation of the eight' section of the charter of the said plaintiff in error, and of the charter contract between said State of Illinois and said plaintiff in error, and

therefore not void by reason of its repugnancy to provision of the Constitution of the United States prohibiting the States from passing
158 any law impairing the obligations of contracts.

3d. The said supreme court of the State of Illinois, upon the record and proceedings before it, should have rendered judgment in favor of the said plaintiff in error and against the said defendants in error.

For which errors, and others appearing in the record and proceedings aforesaid, the said plaintiff in error prays that the judgment of the said supreme court of the State of Illinois may be set aside, reversed, and wholly for nought esteemed, and that it may be restored to all things which it may have lost by reason thereof.

JNO. N. JEWETT,
Att'y for Pl'ff in Error.

(Indorsement on cover:) No. 241. The Illinois Central Railroad Company, plaintiff in error, vs. The People of the State of Illinois. Illinois sup. court. Filed 14th July, 1880.

3713——4

108-541

OFFICE SUPREME COURT U. S.
FILED
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1882.

No. 241.

THE ILLINOIS CENTRAL RAILROAD CO.

vs.

THE PEOPLE OF ILLINOIS.

JOHN A. CAMPBELL,
For Plaintiffs.

J. MURPHY & CO., PRINTERS, BALTO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1882.

No. 241.

THE ILLINOIS CENTRAL RAILROAD COMPANY,

vs.

THE PEOPLE OF ILLINOIS.

I.

The railroad property of the plaintiffs aforesaid, the obligations which the ownership of that property imposes, and the powers, franchises, privileges and rights with which they are invested to control and to manage it, have their origin in the Act of Congress of the 20th of September, 1850, appropriating to Illinois for the construction of this railroad a grant of public lands, and in the charter of incorporation of February 10, 1851, by which the plaintiffs became associated with the purposes and plans of the United States and of the State of Illinois. This Act of Congress is addressed to the State as a persuasive to undertake the construction of the railroads and confers an authority to delegate to others the accomplishment of that enterprise. The charter transfers to a corporation

this duty and all of the appropriation of public land as a motive, and besides, confers plenary powers, franchises, privileges, to enable this corporation to carry on the undertaking successfully.

The purpose of these acts was to assure the production of a work promising public utility of great value, for employment by the government of the United States, definitely and permanently, and to the State and the citizens of the State as a public highway surpassing those previously existing. The United States reserved during all time the use of this railroad for transportation of troops and property, and the public mails; and the State also became a party immediately interested in all of the proceeds of the business of the railroad company year by year. The entire property of this corporation was mortgaged to these sovereign powers for the fulfilment of the contract made by the corporation with them respectively. The work the corporation agreed to perform was continuing, demanding capital, capacity and industrial activity to be incessantly employed; the union of thousands of men; and the responsibility and hazard of loss and damage incident to such a business was large and incalculable. The parties to these acts and undertakings were entirely competent to estimate all of the contingencies to arise and mutually agreed that they should be bound to the performance of the stipulations contained in those statutes.

The implication from the two acts of the United States and of the State is, that the magnitude of the undertaking was appreciated, and that neither government was prepared to undertake to accomplish the proposed works. Nor was there any individual or association selected to execute them. There was required unity in the control and in the arrangements for administration and management; there must be fixity and steadiness in the consummation of the aims and purposes of the States which could not be looked for outside of a corporation. Hence Illinois created and endowed a corporation before going forward with the work. With this corporation the contract was concluded. It had been established in this Court that a charter of incorporation was in itself a contract.

The Constitution of the United States had ordained that contracts of a juridical nature had a political and public character; were in the nature of laws between those who made them; and that no State should alter or impair their obligation and effect. The supreme power of the State over persons and things, was thus restricted and controlled in respect to contracts between capable persons, mutually assenting to the terms of the contract. This constitutional recognition of the freedom to make contracts and the security afforded to them when made, inspired mutual trust and confidence necessary to intercourse. Under such conditions the construction, maintenance, operation and management of this railroad property have been conducted and carried on for above a quarter of a century and the contract is yet enduring, and is without limit of time, and yet beyond impairing legislation.

II.

The consideration upon which this corporation agreed to perform the various obligations and duties assumed under the charter, is expressed and defined in the VIIIth section of the Charter; R. p. 30, fo. 97.

It consists in tolls to be *levied* and *collected* for the conveyance of persons and property upon the railroads. The language employed is "the Board of Directors shall have *power*" "*to establish*" such rates of toll; "as THEY shall from *time* to *time* DIRECT and DETERMINE;" and "to *levy* and to *collect* the same for the *use* of the company." These words express fulness of power, to *establish*, as occasion exacts the rates of toll. The power to *direct*, to *determine* what shall be established is vested in this Board, and not elsewhere. The final decision and disposition of the rates to be levied and collected is fixed in this clause of the Act. A toll is the compensation for the service. The only allowable charge is for a service of transportation under a by-law of the Board of Directors. No person is under a compulsion to employ the ser-

vice of this railroad. There are some forty-six corporations managing railroads within the State of Illinois; many of these are competitors of this plaintiff in this business of transportation. The danger of excessive charges cannot be very great under such a condition of supply of railroad transportation, and such a competition among railroad carriers.

III.

The stipulations in the 8th section of this Act were made before a railroad was commenced. These were the inducements offered to obtain a contractor to engage himself to the State. The undertaking was a novel one. There was no assurance of success. There was to be much disaster to result from a failure in the undertaking. Cairo was but a village; Chicago was inhabited by about 30,000 souls: what guarantee was there for a return of the capital or compensation for the skill employed? Illinois on the one side and the corporation on the other were capable and free to make this contract. The Chancellor in Salisbury vs. Gladstone, seems to have answered all of the argument as to any unreasonableness in this contract or which detracts from its binding force. He says: "It is true that a custom to be valid must be reasonable. It is not easy to define the word reasonable when applied to a custom regulating the relation between a lord and his copyholder. That relation must have had its origin in remote times by agreement between the lord as absolute owner of the whole manor and those whom he was content to allow to occupy portions of it as tenants at will. The rights of the tenant must have depended in their origin entirely on the will of the lord and it is hard to say how any stipulations regulating such rights can, as between the tenant and the lord, be deemed void as being unreasonable. Whatever rights the tenants may have demanded or restrictions or conditions imposed by the lord, all were within the competency of the tenant to stipulate for or for the lord to grant."

9 H. L. Cases, 692.

IV.

Nor can it be affirmed that the State may alter or set aside this contract because disadvantageous, or that a better contract may be made. The State has obtained and enjoyed the subject for which she contracted, and the constitution of 1870 shows the tenacity with which she clings to her acquisition. The freedom to make contracts for themselves is secured to the citizen and belongs to the State. It is enough that the corporation has, at the request of the State, bound herself to do and to perform the functions prescribed in the charter. The charter was offered to this plaintiff with an injunction to all Courts to interpret it favorably. If there were equivocal or doubtful phrases or conditions the State assumed the burden of them.

"It does not lie in the mouth of the State to say that she may scatter ambiguous words by which this corporation might be or was likely to be misled."

Lawrence vs. McCalment, 2 How., 426, 450.
Pilkington vs. Scott, 15 M. & W., 660.

The adequacy of the consideration is not for the Court to determine on the conditions of the case as presented to this Court.

Bolton vs. Madden, L. R. 9, G. B., 55.
Smith vs. Hughes, L. R. 6, G. B., 607.

This was for the parties to consider before the contract was finally concluded and the work contemplated faithfully completed.

V.

The specification of rates of tolls and fares is sometimes made in the Act which authorises the construction of the railroad; sometimes the power is vested in a public officer, or a board appointed for the purpose, and sometimes the power is vested in the corporate body charged with the construction of the railroad.

It was decided that where there was no specification of the rates still there would be implied a power to demand a reasonable toll. Palmer R., 86. Gunning on Tolls, 27. Where the power is vested in a board appointed in the Act, the decision of that board is final, and Courts do not review the judgment.

Pritchard vs. Overy, 1 J. & W., 396.

Kensington vs. Phillips, 5 Dow., P. C., 61.

No question could arise were the rates established by a competent authority and the rates were certain and determinate. Between absolute certainty and precise definition, and vague, confused or equivocal expressions, there are many shades of difference, and the cases show the embarrassment which this occasions. This charter does not leave the title to tolls to any implication or inference; nor does this charter settle any rate of tolls to control the board; nor that the same should be fixed and unchangeable. The charter confers *power to direct, determine, levy,* and *collect,* from time to time, through a by-law to be adopted by the Board of Directors, constituted according to the terms of the charter granted by the State. Savigny, discussing the indetermination in contracts, says that there is a difference between the case where no approach to determination is made and other cases where the uncertainty is such that the contract may be defeated, and that case where the object of the contract has been designedly left indeterminate in a certain sense, as where it is referred to the decision of one or the other of the parties to complete the determination. In this latter case he says: "There is an available and an efficacious obligation."

Le droit des Oblig. M. D. Savigny, ch. 1, sec. 38, t. 1, p. 427.

Walker vs. Eastern Counters, 6 Hare, 594.

Wells vs. Davis, 3 Meriv., 507.

The power to assess and to collect the tolls is defined in the charter of the plaintiff, and the mode of its exercise by an appointed

authority is prescribed. It may be fairly questioned whether any capacity to collect tolls can be employed in any other mode under the charter.

Gregson vs. Potter, L. R. 4 Ex. D. 142.
Firth vs. Midland Co., 20 Eq., 100.

In the French administration not a charge is allowable of any sort till after the homologation of the order by the minister of public works for the purpose. The interpretation and modification of the Tariffs are confided to him.

Cotelle des Chemins de fer, to. 2, p. 274, Nos. 427–8.

The necessity for determinate tariffs, and that they should be promulgated and adhered to is manifest, for we see that a change in rates of transportation, suddenly, disturbs markets and imposes pecuniary losses upon dealers. We are aware the question here is one of power. We insist that the by-law of the Board of Directors which the Supreme Court of Illinois overrules and disregards, derived its obligatory force from the common consent of the State and the corporation by the terms of their compact. The Board of Directors derive their authority as legitimately from the State as they do from the company. Both of these covenant to ratify and to confirm the execution of the mandate to the board, to direct and to determine the rates of tolls, from time to time, out of which the State and the company are each to have definite shares.

It is a manifest contradiction of the charter conferred upon the company to subject this corporation to criminal accusations and to oppressive penalties for the performances of the board thus mutually established. It is a more glaring contradiction in the attempt of the Legislature to set up an independent board of their own creation to make the acts of that board inoperative or nugatory, menacing forfeitures and acts of confiscation. The record does not disclose on the part of the board any departure from the language of the contract. Under a constitutional government a doubt might

be very reasonably entertained whether a legislature could abrogate or defeat a contract which had been performed with exactness, and which, calling for acts of performances in some shape or another, day by day and year by year, had not been broken by the corporation in any manner to cause complaint. The commands of the Constitution of the United States to the authorities of the States do seem to afford a full protection to the plaintiffs against these retroactive measures of the defendants in this cause in this Court.

VI.

The legislation of Illinois and expressions in the arguments addressed to the Courts, and which appear in the opinions relative to this legislation, seem to imply the existence of some eminent and indisputable power in the State to relieve herself at her pleasure from any evil or grievance which she supposes to exist, although the immediate product of the contract made by the State to accomplish a result declared to be of the utmost value.

The sovereign power of the State to punish offenders against penal statutes is the weapon selected in this case to nullify the powers to direct and determine the rates of toll, or to levy or collect them under the Act of Incorporation by making it criminal to exceed rates established by an independent board of the selection of the State. To depart from the conclusions of this board is denounced as criminal extortion. We are not able to find in the Constitution of 1848 any power reserved in respect to the corporations charged to make internal improvements, to amend, alter or to revoke the powers, franchises and privileges to be granted to those corporations. The charters were to be liberal, and the legislature commands that this charter shall be liberally construed. Nor can we find any testimony in the records of the State of any overpowering or unreasoning necessity for the employment of such arbitrary legislation to make certain the public salvation. We do not see that the safety of Illinois in any temporal matter of envi-

ronment or discomfiture is at all threatened by the operations of this or other railroads within her borders. The report of the Board of Railroad and Warehouse Commissioners for the year mentions forty-six railroad companies as operating in the State; the railroads of fifty-six corporations whose tracks measure 27,475 miles of single track; 859 miles of double track, and 3,681 miles of sideings; of which lines 8,541 miles of main tracks, and an aggregate of 10,463, are within Illinois. The remainder of the lines come from other States, and carry on a certain portion of their traffic within Illinois. The capital of the corporations of Illinois and of those thus transporting freight and passengers within Illinois, as represented by stock, bonded and floating debt, is $1,167,261,536; their construction is charged at $1,072,681,643. Their debt per mile is $50,255. The gross earnings of the companies in Illinois is $37,628,704; the number of persons having employment is 46,476, who are paid $25,106,329. The amount of stock owned in Illinois is $30,135,100. The net earnings for the companies is $18,767,582.

A large number of the railway corporations connected with the Illinois trade have their domicil in other States and their lines sometimes pass through several,—much more than half of the passengers and freight do not remain in Illinois. It will appear from an inspection of a map showing the lines of railroad in the States east and west of Illinois and within that State that there must be an actual competition and rivalry among them, and that all of the railroads cannot be remunerated. The reports show that three-fourths of the net income is engrossed by less than one-third of the managing corporations. The existence of an overbearing and extortionate monopoly, would seem to be hardly possible. The Illinois Central Railroad is intersected and crossed, and their territory pervaded by rivals from every direction.

The principle of the Act of 1873, if carried out to its whole extent, must make a radical change in the transaction of business. The principle of entire uniformity, without reference to circum-

stances, conditions, or wants of the railroad companies. The magnitude of the capital invested in the railroads and their equipment and operation must be considered. The interest on capital, and the cost of maintenance must be borne by every one of the companies. The running expenses cannot be dispensed with by any of them. Without these the companies must fail and the service discontinued. The only resource is to be found in the levy and collection of tolls. This levy must be regulated by the principle which determines all commercial exchanges. The tolls must be laid so that the forwarder will prefer to employ this railroad to any other mode of transportation. The railroad with a full business can conduct business more favorably than one with a scanty support.

Transportation on some portions of the railroad and of some forms of merchandise is more costly than others. In the contract between the State and a railroad corporation, the important inquiry must always arise how these arrangements shall be made and upon what authority the power to make them be devolved. It was considered in the formation of this charter. There is a carefulness of specification on the part of the company of their wants, there is a fulness and exactitude on the part of the State in their concessions, accompanied with a rigorous demand for service and security for performance, indicative of wariness and intelligence on either side. The provisions of the State have gone to the extent of requiring a mortgage lien prior to all other claims upon the company for the PENALTIES the State might impose from time to time. The charter tax extends to the entire receipts of the railroad, and in the course of twenty-five years has been an income tax of $18\frac{7}{16}$ per cent. upon the net earnings of the railroad company.

This railroad corporation is a public carrier, but it is in the administration of Illinois an agent of the treasury of the State. The transportation of passengers and freight, whether owned in Illinois or be brought over these railroads, contributes and has contributed semi-annually to the payment of the public debt of the State, and

already the State looks to the railroad to contribute to the maintenance and support of the State government, and holds a mortgage paramount to all others to assure punctuality and completeness of payment. The corporation does not complain of the enforcement of the contract by the State, but on their part respectfully demand that the State shall not be discharged from performance on her part, by any arbitrary enactment of her legislation.

The Supreme Court of Illinois has recognized in a number of cases that several of the stipulations in this charter were to be observed as contracts as cases arose in which the decisions became necessary.

Ill. R. Co. vs. McLeon Co., 17 Ill., 291.
Newstadt vs. Ill. R. Co., 31 Ill., 484.
Ketchum vs. People, 72 Ill., 212.
Ill. Cent. vs. Goodwin, 94 Ill., 264.

The Court affirms the same proposition in the judgment rendered in this suit as a general proposition, but that the enactment of May, 1883, having designated certain acts which would be criminal as acts of discrimination and having commissioned a board to determine that certain rates of their appointment would be extortionate, unless the Board of Directors accepted this oversight and control and observed their guide posts, that their own commission was superceded and the corporate life of the company was endangered, and that the charter furnished no support under the plea that it was an obligatory contract.

We respectfully submit a dissent to this conclusion of the Supreme Court of the State of Illinois.

JOHN A. CAMPBELL,
For Plaintiffs.

ILLINOIS CENTRAL RAILROAD COMPANY.

No. 1.

Year.	Net Earnings.	Charter Tax.	Per Ct. of Tax to Net Earnings.
1857	$ 420,326 08	$ 145,645 84	34^{6}
1858	424,618 19	132,005 53	31^{9}
1859	485,697 94	132,104 46	27
1860	793,887 85	177,557 22	22^{4}
1861	1,071,855 51	177,257 81	16^{5}
1862	1,555,029 37	212,174 60	13
1863	2,053,047 71	300,394 58	14^{6}
1864	2,389,606 27	405,514 04	17
1865	2,057,140 87	496,489 84	24^{1}
1866	1,882,152 33	427,075 75	22^{7}
1867	1,998,881 81	444,007 74	22^{2}
1868	1,696,961 46	428,397 48	25^{2}
1869	2,091,756 06	464,933 31	22^{2}
1870	2,301,191 33	464,584 52	20^{2}
1871	2,349,781 62	463,512 91	19^{8}
1872	1,552,503 97	442,856 54	28^{5}
1873	1,711,966 09	428,574 00	25
1874	2,101,557 86	394,366 46	18^{8}
1875	2,164,238 04	375,766 03	17^{4}
1876	1,830,770 71	356,005 58	19^{4}
1877	2,118,084 38	316,351 94	14^{9}
1878	2,283,571 42	320,131 71	14^{3}
1879	2,434,416 68	325,477 38	13^{4}
1880	2,578,103 77	368,348 66	14^{3}
1881	2,425,579 51	384,582 52	15^{8}
	$44,772,726 83	$8,584,416 45	18^{7} Average Per Cent.

ILLINOIS CENTRAL RAILROAD COMPANY.—No. 2.

Year.	Net Earnings Illinois Proper.	Interest on Debt Net.	Net Result after Deducting Interest. Italic Figures = Deficit.	Charter Tax.	Per cent. of Tax To Net Results.
1857	$ 420,326 08	$ 1,347,353 56	$ *927,027 48*	$ 145,645 84	
1858	424,618 19	1,340,997 50	*916,379 31*	132,005 53	
1859	485,697 94	1,287,540 00	*801,842 06*	132,104 46	
1860	793,887 85	1,277,279 67	*483,391 82*	177,557 22	
1861	1,071,855 51	1,110,222 83	*38,367 32*	177,257 81	
1862	1,555,029 37	1,047,188 40	507,840 97	212,174 60	41[8]
1863	2,053,047 71	1,093,798 49	959,249 22	300,394 58	31[3]
1864	2,389,606 27	1,118,745 66	1,270,860 61	405,514 04	31[9]
1865	2,057,140 87	938,587 38	1,118,553 49	496,489 84	44[4]
1866	1,882,152 33	879,919 30	1,002,233 03	427,075 75	42[6]
1867	1,998,881 81	859,277 63	1,139,604 18	444,007 74	39
1868	1,696,961 46	755,716 92	941,244 54	428,397 48	45[5]
1869	2,091,756 06	645,436 90	1,446,319 16	464,933 31	32[1]
1870	2,301,191 33	589,053 28	1,712,138 05	464,584 52	27[1]
1871	2,349,781 62	495,681 75	1,854,099 87	463,512 91	25
1872	1,552,503 97	373,896 07	1,178,607 90	442,856 54	38[4]
1873	1,711,966 09	558,437 12	1,153,528 97	428,574 00	37[1]
1874	2,101,557 86	413,610 20	1,687,947 66	394,366 46	23[4]
1875	2,164,238 04	661,098 57	1,503,139 47	375,766 03	25
1876	1,830,770 71	616,792 01	1,213,978 70	356,005 58	29[3]
1877	2,118,084 38	582,990 49	1,535,093 89	316,351 94	20[6]
1878	2,283,571 42	497,142 91	1,786,428 51	320,431 71	17[9]
1879	2,434,416 68	455,139 64	1,979,277 04	325,477 38	16[4]
1880	2,578,103 77	443,568 27	2,134,535 50	368,348 66	17
1881	2,425,579 51	547,708 21	1,877,871 30	384,582 52	20[5]
			$ 24,835,544 07	$ 8,584,416 45	34[6]

108-541

OFFICE SUPREME COURT U. S.
FILED
MAR 27 1883
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the U. S.

October Term, 1882.

No. 241.

ILLINOIS CENTRAL RAILROAD COMPANY,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

JOHN A. CAMPBELL,
Attorney for Plaintiff.

JOHN MURPHY & CO., PRINTERS AND STATIONERS, BALTIMORE.

Supreme Court of the United States.

No. 241.

ILLINOIS CENTRAL RAILROAD COMPANY,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF ILLINOIS.

I.

Statement of the Controversy.

The plaintiff complains of a judgment rendered in the Supreme Court of Illinois affirming a judgment rendered against the corporation in an action of debt by the defendant. This judgment was for a penalty imposed in an Act of the General Assembly approved May 2, 1873, upon offending railroad corporations for disregarding the terms of that Act in their charges for the transportation of freight and passengers.

The demand upon the plaintiff was made because there had been collected from a shipper of salt upon the railroad the sum of three dollars and fifty-five cents above, and in excess of the maximum rate allowed under the statute for such a shipment. It appears in the case before the Court that there had been a classification of freights by commissioners appointed under the

statute, and that tables and rates had been established and published which were applied to the railroad of this plaintiff, and that the sum collected was in excess of the rates specified in those official tables as stated in one of the counts of the declaration. It also appeared that the sum charged and collected by the plaintiff conformed to rates established by the Board of Directors of the corporation, and exhibited in a by-law adopted before the Act of May, 1873, was passed, and the plaintiff affirmed a title to do so, had been conferred upon the corporation by the terms of their act of incorporation.

The Supreme Court overruled their defense and asserted that there was no authority in the charter to justify their charge, and the Act of May, 1873, was valid and controlled the plaintiff.

I. C. Railroad Co. vs. The People, 95 Illin., 313.

II.

Act of Congress, September 20, 1850.

The railroads of the plaintiff originated in an Act of the 31st Congress, 1st session, ch. 61; 9 Stats. at large, pp. 466–7.

Congress granted to the *State of Illinois* for the construction of two lines of railroad, one from Cairo to Chicago, and one from Cairo to Dubuque; a right of way two hundred feet in width through the public lands; also alternate sections of land on either side of the railroads and their branches, for six miles to aid in making the roads and the branches. The railroads were to be completed in ten years; otherwise, the lands or their price, were to revert to the United States. The railroads when completed were to remain a public highway for the use of the government of the United States, free from toll or other charge, for transportation of troops and property of the United States, and the mails were to be transported under the direction of the Postoffice department at such price as Congress should by law direct.

Secs. 4, 5, 6.

III.

Charter of Illinois Central R. Co, February 10, 1851.

This corporation was established by the General Assembly subsequently to the Act of Congress, with full powers, privileges, immunities, franchises, and faculties for acquiring, holding, and transferring property, to carry into *full* effect the *purposes and objects* set forth in the Act. The completion of the two railroads with branches, and their maintenance and operation as designated in the Act of Congress and the Act of incorporation and in the manner specified, are purposes declared. The General Assembly *granted* to the corporation for its *sole use and control* for the purposes declared, a right of way for two hundred feet in width through the lands of the State, with authority to acquire this right over lands not owned by the State. The charter provides for a board of directors to execute the powers conferred, the Governor of the State always to be a member. The usual provisions to secure the property of the corporation from dilapidation or damage, for facilitating connections with other companies, for the security of passengers and persons from injuries, and for police, are contained in the Act. The grant made by Congress to the State is transferred in full property to the corporation under the conditions set out in the 15th section of the Act. The corporation was substituted for the State and was required to do and to perform whatever condition or demand the United States had imposed or might exact under the terms of their Act of 1850. To assure the appropriation of the proceeds from the sales of the lands for construction and maintenance and fulfil the contract made between the United States and Illinois, the corporation executed a deed of trust to persons designated, which comprehended the lands, and also the railroad property of every kind, present and future, which constituted a first lien for those purposes.

IV.

Special Powers to the Company.

The seventh section of the charter empowers the President and Directors to execute all the powers granted in the charter for survey, location, construction, maintenance, and operation; for the transportation of persons, goods, merchandise, and with all powers of control and management necessary to carry into full and complete effect the meaning and intent of the Act.

The eighth section authorizes the adoption of by-laws, rules, regulations, that may be deemed expedient to fulfil the purposes of the Act not repugnant to the constitutions or laws or charter. "The *Board of Directors* shall *have power to establish such rates of toll for the conveyance of persons and property* upon the same, as *they shall* from *time* to *time* by their *by-laws direct and determine, and to levy* and collect the *same for the use of the Company;* the transportation of persons and property; the width of the track; the construction of wheels; the form and size of the cars; the weight of the loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said Board of Directors shall from time to time determine." But the location of the railroad within the bounds of a city must have the sanction of the city council.

V.

The Charges upon the Act of Incorporation.

The General Assembly embody in the 18th section of the charter the charges and incumbrances to be imposed upon the corporation, additional to those contained in the 15th section and in the deed of trust. The terms of this section are: "*In consideration* of the grants, privileges and franchises herein *conferred* upon said company for the *purposes* aforesaid the said company shall

on the first Mondays of December and June in each year, pay into the Treasury of the State of Illinois five per centum. on the gross or total proceeds, or receipts, or income, derived from said road and branches for the six months next preceding.

"The first payment of such per centage on the main trunk of said road to commence four years from the date of said deed of trust, and on the branches six years from the date aforesaid, unless said road and branches are sooner completed, and then from the date of completion."

The corporation is required to furnish accurate accounts, properly verified, and the State reserves a power of inquiry and of examination to verify the statements.

The State in the 22d section reserves a power of taxation over the property, but taxation is not to exceed seven per cent. of the gross proceeds, including the five per cent. above mentioned.

The last section of the Act provides that the *construction* of the Act in all Courts, shall be FAVORABLE.

VI.

In the year 1870, the sovereign powers of Illinois made a new constitution for the State government. They ordained: "Railways heretofore constructed, or that may be constructed, in this State, are declared to be public highways and to be free to all persons for the transportation of their persons and property, under such regulations as may be provided by law. And the General Assembly shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State."

"The General Assembly shall pass laws to correct abuses and prevent unjust discriminations, extortion in the rates of freight and passenger tariffs on the different railroads in this State and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

Const., XI Art., secs. 12, 15.

In the same Constitution there is a separate article which has an immediate connection with the plaintiff in this suit.

"No contract, obligation, or liability whatever of Illinois Central Railroad Company to pay any money into the State Treasury, nor any lien of the State upon, or right to tax property of said company in accordance with the provisions of the charter of said company, approved February 10, 1851, shall ever be released, suspended, modified, altered, remitted, or in any way diminished or impaired by legislative or other authority; and all moneys derived from said company after the payment of the State debt, shall be set apart for the ordinary expenses of the State government, and for no other purpose whatever."

This separate article of the Constitution of Illinois, adopted in 1870, refers to the 15th and 18th articles of the charter of the company. The deed of trust, executed under the terms of the 15th section, imposes a lien prior to all others upon the property of the company, to secure the construction, equipment and operation of the railroads, and the performance of the contract with the United States under the Act of Congress of 1850. In the 24th section there is reserved a similar lien to secure penalties, taxes, dues, that might accrue to the State against the corporation.

Thus a perpetual first mortgage lien exists in favor of the United States and the State, and which the legislature must not in any manner affect or alter.

VII.

The Statute of May 2, 1873.

The Act under which this suit was commenced against the plaintiff was framed to carry into effect the Constitution of 1870. These sections are found in the Revised Statutes, ch. 114, secs. 86–95. The Act provides for the appointment of commission-

ers who were to determine and direct maximum rates of charges for the transportation of passengers and freights and cars upon railroads of the plaintiffs. The maximum rates as to the article of salt contained in the commissioners' returns were less than the tariff of rates which had been directed and determined in a by-law of the corporation prior to the enactments in 1873. These commissioners' rates were to be taken as evidence of a reasonable charge and to charge more was conclusive of guilt under the terms of the Act.

I.

The Claims of the Plaintiff in Error.

1. The plaintiff asserts that the Act of the General Assembly of the State of Illinois to incorporate the Illinois Central Railroad Company had for its purpose and object to organize a civil corporation, in which there should be aggregated capital, skill, capacity and industry to be employed in the construction and management of the railroads and their branches as designated in the Act of Congress of September 20, 1850, within the time fixed in that Act, and to maintain the same in a condition to perform the obligations exacted in the Act of Congress for the benefit of the United States in a time of peace or of war.

2. The plaintiff asserts that the location, surveys, and the sales of the public lands appropriated by the Act of Congress, and the application of their proceeds as directed to the completion of the railroads; the employment of the capital, skill and industry of the corporation to the construction, equipment, operation and management of the railroads according to the requirements of the Act of Congress, and for the pecuniary profit of the State of Illinois in the division of the gross proceeds of the undertaking; also in the assumption of the responsibilities, risks and labor of carriers of persons and property—as well public and private—with fidelity, constitute a CAUSE and a CONSIDERATION for all of the

grants of power, franchise, privilege, control and management contained in the Act of the General Assembly of February 10, 1851.

3. The plaintiff asserts that it appears upon the face of the said Act that the General Assembly of the State of Illinois prepared the same as an overture to the persons mentioned in the Act; and that the General Assembly required an unconditional acceptance of the same within a term fixed in the Act, and required of the persons accepting and becoming members of the company to execute a mortgage of all of the property vested in the construction, equipment and operation of the railroads; and exacted a share of the proceeds of the business to be paid semi-annually into the Treasury in preference to every other expenditure. That the plaintiff in accepting the charter and performing the conditions imposed became entitled to make, ordain, and establish by-laws, rules, and regulations for the "well-ordering, regulating and securing the affairs, business and interests of the company which were not contrary to the laws" and that they were specifically empowered to "establish such rates of toll for the conveyance of persons and property on the same as they shall from time to time direct and determine by their by-laws; and also to levy and to collect the same for the use of the company; and that all other matters and things respecting the use of the railroad and the conveyance of persons and property" shall be according to the rules and regulations of the Board of Directors.

4. The procurement of the Act of Congress in September, 1850, in favor of the State of Illinois, was designed to facilitate her in the prosecution of measures for her own development. This was the first successful application to Congress for an appropriation of grants of land for the construction of railroads. Congress required a compensation for the appropriation in services for the transportation of the public property, and a speedy completion of the works proposed to be made. The option was given to Illinois, to construct the railroad within the

term prescribed in the Act, or she was permitted to dispose of the lands for that purpose, and for none other. The Legislature made the election within six months after the date of the Act to use the lands for the purpose and to engage a corporation to fulfil the conditions imposed by Congress. At the same time she made a bargain for her own advantage as a political corporation. She required that a share of the gross proceeds or income of the corporation should be punctually paid into her own treasury semi-annually, for the various grants, privileges and franchises set forth in the act of incorporation and required the execution of a deed of trust with a mortgage upon the property of the corporation to secure the payments of taxes, dues of every description, and to secure the penalties that she might impose. The corporation in accepting the act of incorporation assumed responsibilities and risks commensurate with its corporate life. The indemnity to Illinois—against the demands of the Act of 1850 and the agreement to perform the obligations the Act imposed—is a continuing covenant. The business of managing a railroad is hazardous, and the issues of that business are aleatory and undefinable. The enactments of the General Assembly, and the principle contained in them, evince this in a very intelligible form. In the ordinary transactions there is a constant demand for skill, knowledge, aptitude for combination, and for making connections, sobriety, industry, fidelity, force. There are constant charges, expenses, competitions, disturbing elements for affecting income, and prosperous business. In no point of view in which the contracts contained in the charter can be viewed, can it be reasonably alleged that there is any gratuity conferred, or that one was intended by the State. The country through which the road passes was then unsettled and the population was sparse. The State reserved for herself a share of the income of the business and that the interests of the State should be supervised by the Governor who is to be a director in the company. The last constitution of the State prohibits any diminu-

tion of her interest in the company. Not content with all these reservations she has a judgment under her new legislation as a penalty for an act of extortion, in taking a sum for freight according to the charter, and of which sum a portion has already been paid into the treasury of the State according to the charter. The money was taken from the shipper under a by-law authorized to be made. The Governor of the State being a member of the board that adopted the by-law.

5. It is to be noticed that the United States in her grant to Illinois are cautious to define the pecuniary conditions to be observed by the owner of the railroad in respect to them. The railroad is to remain a public highway for the transportation of troops and property of the United States without tolls or fares. The Congress shall determine the charges for Postoffice accommodations and service. The State of Illinois is very particular in making arrangements for her own *peculium*. She takes a share of the gross receipts with a deed of trust to secure the payment to herself and an indemnity against demands from the United States. The State being thus contented, confers grants, privileges and franchises to enable the corporation to accomplish the undertaking and to carry into execution from generation to generation the work thus initiated by the United States, with the grateful acknowledgments of Illinois; and which this corporation undertook upon the terms drawn out by Illinois and tendered for acceptance by this body of corporators, or any other that might do so.

II.

Assignment of Errors in the Judgment of the Supreme Court of Illinois.

The plaintiff in the writ of error from this Court assigns for error in the judgment therein described:

1. That the said Supreme Court confirmed the judgment before that Court against the plaintiff, and condemned the plaintiff for a breach of the terms of the statute of the State of Illinois, approved May 2, 1873, upon the petition of the defendant in the writ of error in this Court, to the payment of the sum specified in the judgment and costs. And the plaintiff avers that the statutes of the State of Illinois aforesaid in the matters set forth in the proceedings of the said Supreme Court, and in the judgment given by the Court, were inoperative, invalid, and wholly insufficient to support the proceedings and judgment aforesaid. For that the said statute impaired the obligation of the contract contained in the act of incorporation set out in the suit and established to the said Court, and by the terms of the said statute and the judgment in favor of the same the plaintiff is deprived of property and rights of property without due process of law. Therefore that the statute and judgment violate the rights of the plaintiff as secured in the Constitution of the United States. And this the plaintiff is ready to verify. Wherefore the plaintiff prays judgment and that the judgment be annulled and that the plaintiff have restitution of all she has lost by the same and a judgment for all costs.

2. And for further assignment of error the said plaintiffs aver that the said corporation acquired through the Act of Congress, approved September 20, 1850, and the Act of the General Assembly of Illinois, approved February 10, 1851, for the "*sole use and control*" of the said corporation, and for all the purposes and objects declared in those Acts, for the whole length of their railroads and branches a right of way, and for other lands for the construction, completion, maintenance and preservation of the same: that accompanying the grants there was a right to possession, enjoyment and usufruct of a public highway to be managed in the service of the United States, and of the State of Illinois and the public: and powers, franchises, immunities and privileges were invested in the corporation in connection with

the occupation, maintenance and employment of their highway. That the rights aforesaid, of every nature, are real rights in property and have been exercised by possession and use and are distinct and separate from the rights, powers and authorities of the United States and of the State. That being derived from them, and being managed, controlled and used for their advantage and benefit under agreements and bargains made with them, they are respectively bound to observe, support and maintain this plaintiff.

The plaintiff avers that among the rights, privileges, franchises, powers, invested in them, are those set forth in the 8th section of the act of incorporation aforesaid which empowers the corporation to prescribe the rates of toll to be charged for service on the said railroad and the branches, the most essential and compensatory of the conditions contained in the charter for the benefit of the plaintiffs, and the consideration for all the capital, labor, skill, responsibility and engagements, which the said plaintiffs have expended, employed, or contracted to supply, or perform under the same. And the plaintiffs having possession as aforesaid and having fulfilled their engagements and undertakings, the defendants by a series of legislative acts have prohibited the plaintiffs from using the faculties contained in the section of the Act aforesaid, and imposed penalties upon the plaintiffs for exercising the powers, franchises, immunities and privileges granted and the said defendant has obtained the judgment contained in the record of this cause. The plaintiffs aver that the Acts of the General Assembly impair the obligation of the contract contained in the charter granted to the plaintiff and infringe arbitrarily the rights of property conveyed by the said charter, and subjects the plaintiff to a new and partial mode of trial and testimony contrary to the 14th amendment of the Constitution. Wherefore the plaintiff prays the judgment be set aside and the suit dismissed with costs to be paid by the defendant.

POINTS AND AUTHORITIES.

I.

The Illinois Central Railroad Company accepted the grant tendered by the General Assembly of the State of Illinois to the corporators and thus became entitled to a right of way upon, and a right "to appropriate to its *sole use* and *control* for the purposes contemplated in the grant" two hundred feet in width on land, with a power to use the materials found to be necessary to construct, complete, maintain and operate the railroad described in the grant. The corporation was invested with all the powers, privileges, immunities, and of acquiring, holding and conveying real and personal estate, needful to carry into full effect the purposes and objects of the Act for the completion of a railroad of the best model.

II.

The objects and purposes of the Act were to transport upon the railroad the property and troops of the United States during all time, without toll or other charge; to convey the mails of the United States under the direction of the Postoffice department, at such price as Congress should direct; and to be ready to do this within ten years from September 20, 1850; the transportation upon the railroad of persons, goods, wares, merchandise and property, upon such rates of toll as the Board of Directors shall, from time to time, by their by-laws determine.

The payment semi annually to the State of five per centum on the gross proceeds, or receipts, or income derived from said road and branches for the six months next preceding the days fixed for the payment of this contribution.

The payments were to commence from the date of the completion of the railroad and branches.

III.

It cannot be denied that the sections (18, 22) eighteen and twenty-two, which determine the pecuniary relations between the State and the corporation; and the sections fifteen and twenty-four (15, 24) which provide an assurance for the fulfilment of the terms of the contract between the State and the corporation, are in form and effect commutative contracts, having immediate reference to the reciprocal obligations which each has to perform after the undertaking proposed becomes complete and operative for the consummation of their mutual "*purposes and objects.*"

If a charter of a corporation be in any case a contract, the charter granted to this corporation is entitled to be so considered.

The charter was offered to the corporators named in the Act for sixty days in the twenty-third section, and in case those did not accept, and excepting did not survey and locate the road and branches, and actually begin the work thereon before the end of that year, their claim to the charter became void; and the same charter might then be conferred on another company with all the rights, powers and immunities conferred upon the corporators therein named, and to be subject to all the liabilities set forth therein, as if their names had been originally inserted.—Charter, sec. 26. The first act to be done by the Illinois Central Railroad Company, after their acceptance of the charter, was to take upon herself all of the obligations contained in the Act of Congress to be fulfilled by the grantee in that Act, and to execute the deed of trust specified in the 15th section of the Act. These obligations are perpetual in their duration, and according to the Constitution of 1870 of Illinois never to be released, modified or satisfied with any consent of the State by the company.

IV.

A commutative contract is where each one of the parties engages to deliver or to perform something which the other deems to be an equivalent for something to be delivered or done by himself. The commutative contract may be an aleatory contract for the effects, advantages, or losses may not be determinable or may depend on uncertain events. A bargain for fruits or profits to arise, or in anticipation, for continuing employment for persons unknown, or for work and labor to be performed, without specification or detail, or even whether there will be a requirement for such employment is at once commutative and aleatory. The great variety of acts and efforts to be made and of the results to be accomplished and the uncertainty of the success of those acts and efforts do not impair the binding effect of the contract, nor authorize either to derogate its conditions or obligatory force. A State should seldom allow herself to have an aleatory contract of any description. All her services should be on a principle of certainty and exactitude. Her power to make binding contracts of an aleatory nature is indisputable, and its exercise common.

V.

But the main purpose and object of this contract, between these parties was the survey, location, construction, completion, alteration, maintenance, operation and management of the railroads designated in the Act of Congress as an entire work to be continuously and efficiently employed for an indefinite period. The fulfillment of the contract in its successive stages has been partial and divisible and its progress persistent.

The purposes and objects of the contract have not been entirely nor fully answered, and will not be so until there be a consent between the respective parties to a rescission, or an alteration, or abandonment. The specific purpose of the State of Illinois, in

the manner in which that purpose was declared in the Act to incorporate the Illinois Central Railroad Company and the definite and durable form for the achievement of that purpose, have been attained by the construction, maintenance and management of the railroads, under the terms of the charter and a compliance with all of the terms of the contract as made in the year 1851, in respect to semi-annual payments to the State and of indemnity of the State from all demands of the United States, because of the appropriation of public lands, by a satisfactory performance.

VI.

The Illinois Central Railroad Company is entitled to an exact performance and to an exact forbearance in conformity with the terms of the contract. In every contract, however simple or however complicated the primary right of the party who is to receive the benefit, is always to have the very thing done or omitted, which the other party has promised to do, or to omit—a right to the specific acts or forbearances for which the agreement stipulates; and the corresponding primary duty of the party on whom the obligation rests, is to do or to omit, exactly, what he has undertaken to do, or to omit.

The terms of the contract itself defines the nature and extent of the primary rights and duties which result from it. Neither party can change the mode of performance, nor substitute for the specified forms for the ascertainment of any results, a form of a different character.

The Illinois Central Railroad Company was originally convened under the invitation of the State of Illinois for the definite purpose, and the immediate and declared object of taking into consideration, whether the members of that company should become a body corporate and politic, and should undertake to consummate the great work proposed for their completion in the Act which had received the sanction of the General Assembly

of the State, with an assurance on the face of the enactment that the corporation shall be invested with all the powers, privileges, immunities, and the franchises and capacity needful to carry into effect, FULLY, the *purposes* and *objects* of the Act, and particularly that their board of directors shall be empowered to establish such rates of toll for the conveyance of persons and property upon their railroad as they shall from time to time *direct* and *determine*, and to *levy* and *collect* the same for the *use of the company*.

VII.

We do not affirm that the grants of the right of way for the sole use and control of the corporation for the purposes contemplated; nor the grants of powers, privileges, immunities and franchises conferred on the company; nor the important public duties to be performed for the United States free of charge, or for such compensation as the Congress may concede; nor the share of the total proceeds of every semi-annual term of operation have exonerated the corporation from all governmental control, nor have established an independent and irresponsible power or person within the bounds of the State of Illinois to all the comprehension of the purposes and objects of the Act.

We acknowledge without any difficulty that all the powers, political, corporate, and personal, which the company has, and all the property, movable and immovable, and all the franchises, privileges and immunities conferred, had for their purpose and object to conduct the transportation of persons and property along the railroads and their branches for the considerations expressed in the act of incorporation. We do not claim that the title to their property was derived to them on common law principles, nor their rights measured by rules of common law, nor that the company can exercise powers other than those with which the charter has clothed it.

Perrine vs. Chesapeake Co., 9 H., 184.
Olcott vs. Supervisors, 16 Wall., 694.
Chicago vs. Smith, 62 Ill., 274.

VIII.

It is manifest from the terms of the act of incorporation that both of the parties to the agreement fully understood that the final result of the entire act and the conventions contained in it, as between the State and the corporation is to be found in an account for service on the one part and of compensation for service, and conceding that the Act to have been made by the General Assembly on behalf of every person interested in anything to be done under the Act, (Blakeman vs. Glamorgan, 1 Myl. and K., 162) it more distinctly appears that the result is a commutative contract for transportation for goods, wares, merchandise, and other property, and of persons, for a compensation determined in the Act, or determinable according to the forms of the Act. In the Act the corporation is empowered to establish rates of toll for the conveyance of persons and property in a by-law, and whatever other matters and things respecting the use of the railroad and the conveyance of passengers shall be in conformity to such rules and regulations as said board of directors shall from time to time determine. Generally, there is a full management conceded, but it is responsible and subject to supervision and direction within the bounds prescribed, so that no power not granted shall be employed, and all powers should be executed within the terms of the charter.

IX.

Under the French system of railway management upon the concession of a privilege to construct a railroad, there is annexed what is termed a *Cahier*, or schedule of conditions and charges,

upon which the work is to be completed. The language of the *Cahier* is: "To indemnify the company for the constructions and the expenditures they have agreed to accomplish, and upon the express condition that all the obligations of the contract are fulfilled, the government grants, during the entire term of the concession, the authority to collect the tolls and charges for transportation as hereinafter determined."

This *Cahier* of charges is the law between the parties. It binds the company which accepts it, and the government itself, which cannot modify it without the consent of the grantees or concessionaries. In all that concerns the management and the pecuniary interest of the companies, the administration cannot by its regulations increase the burdens nor diminish the benefits resulting from the stipulations in the *Cahier*. A modification of the *Cahier* cannot take place without a new convention between the administration and the company—that is, by mutual consent.

44 Dalloz, Jurisp. Gen. (2d part), p. 889, No. 114.
Ibid., p. 922, No. 293.

For the purpose of presenting a case of governmental control over railroads where it has been reduced to a system, we abstract from approved authors this statement.

The State in conceding to railroad companies the privilege to construct lines of railroads authorizes them to collect rates of compensation as settled in the act of concession, and by supplementary acts. In France, the fixed and permanent rule is that no single charge for compensation for railroad service can be made unless it has been previously specified in the *Cahier* of rates established with the consent of the government. The acknowledged purpose of these conditions is to secure all classes from the impositions and excesses that might occur from such a monopoly, and to protect the company from the litigations and

animosities to arise from passengers and forwarders. This mode of supply of railroad transportation was adopted in preference to that which prevailed on the continent of Europe, where the State was at this date the owner and manager of the principal lines. In France, private ownership and management under the severest supervision and direction, was selected as preferable to the British and American freedom, where the subject was delegated to railway corporations without much control, or to the Continental system of exclusive ownership and management by the governments.

Duverdy, Traite du Transportation, Nos. 159–166, pp. 210–216.

3 Dufour, Droit. Adm., Nos. 225, 255.

X.

In the legislation of Great Britain and of the several States of the Union, and of the United States, there was not till lately any appearance of *terror* of monopolies, oppressions or exactions; nor has there been revealed those salutary and prudent precautions indicative of sober statesmanship. An exuberant demand for what has been termed a development of the resources of the country, without a care for the ways and means, has sometimes appeared. Subsidies, loans of State credit, in the shape of bonds and endorsement of corporate bonds, county and city subscriptions have been common. Individual interest, activity, and capacity to provide the most desirable results have been relied on with full confidence. In respect to charges of transportation there has been an unhesitating belief that competition, and the accord between the interests of the public and the railway company, rendered any restraints unnecessary and unprofitable. The burdens of constructing and operating railroads have been so onerous that the difficulty heretofore (before

1870), has been to obtain persons to embark capital and enterprise in their production and operation in many of the States. It has been the common experience that the original projectors have become insolvent.

The constitutions of the States during that epoch are mandatory to the legislatures to take care of the growth and expansion of the country.

Illinois, in the year 1848, adopted her second constitution. The tenth article relates to CORPORATIONS. The People were indifferent to, or somewhat hostile to *Banks;* not well content with chartered corporations, but after a sober consideration in their last and final directions to the General Assembly, the representatives of the State were enjoined to think favorably of a single class of corporations. The sixth section is: — "THE GENERAL ASSEMBLY SHALL ENCOURAGE INTERNAL IMPROVEMENTS BY PASSING LIBERAL LAWS OF INCORPORATION FOR THAT PURPOSE." There were in that period exclusive rights and privileges granted to corporations, so as to relieve them from any competition.

The powers of management were without restriction. The imagination of an antagonism between the interests of the PEOPLE and the railroad company was never entertained. We have seen that the *Cahier* of charges in France was full in specification of amounts and permanent in effect. The charters in Great Britain were not so exact, but the provision of permanent charges allowed to be made by the companies was made. So there were a few cases of the kind in the United States. This provision was not universal, perhaps not general, only occasional. But it is now obvious that such a provision as we have quoted from the usual conditions in the *Cahier* for rates and charges to exist for the term of the concession (ninety-nine years) would have but little value in this country, where all the conditions are varying, and where the prices for one decade could hardly afford room for a conjecture as to their amount in the next.

The interest of the companies in the enlargement of their traffic, and in varying the subjects of transportation, though not a satisfactory security from excesses in railroad management, is superior to the fixed and permanent schedules made out at the date of the charter, and before the railroad was commenced, without a provision for any alteration. But what capitalist would invest if he were dependent upon the chances and changes of a State board acting independently of himself or his railroad company for the compensation for work, labor, and the interest on capital invested? There might be a confident reliance upon the Congress to determine the rates of compensation for railway service, in the transportation of mails, with fairness, but the same confidence could not be felt when the forwarders and those connected with them compose the mass of the community. In the contrast between the Illinois Central Railroad corporation and the State, the latter submitted the decision of the question of rates to the corporation, from time to time, rather than to herself.

XI.

The people of the State of Illinois deliberated in 1848, when the constitution of the State was under consideration, and when the act of Congress in 1850 was presented for adoption by Congress, and for acceptance by the State, as to the mode for constructing railroads in the State, and what agencies should be employed.

The arguments in favor of ownership by the State of these important agents of intercourse and of commercial exchanges are forcible, if not entirely convincing.

There would be unity in the management, and a full control of the subject of rates, and a relief from all apprehensions of a monopoly, or of companies banded to disturb regular operators of commerce. Whatever profit might arise from the business

of transportation would be paid into the public treasury, and be employed for the common benefit. The police arrangements would be entirely under the public control, without danger to private rights. These did not convince the State of Illinois.

The superior energy of individuals employed about their own business; the corruptions to result from the enlargement and discipline of an official administration so important and extended; and the inability of the State to provide the means to construct works of such a magnitude, determined the legislature of this, and also of other States, to rely upon corporate capital, energy, enterprise and intelligence. The people instructed their legislatures to grant liberal charters to companies, and the legislatures did so, and enjoined the courts to be *favorable* in their interpretations. They enticed capital and capacity to perform the work by grants of the sale and exclusive use of the rights of way; the allowance of rights of expropriation, and the faculties of determining and directing the rates to be taken, and that these should be collected for the company. In the case of the Illinois Central Railroad Company, the United States bargained for an immunity from tolls and charges for all time, or that they should assess those upon themselves which they might deem it reasonable to pay. The State provides for a permanent income tax, in addition to other taxes, thus placing upon transportation an additional charge. The Illinois Central Railroad Company has secured these payments to be made and charges to be sustained by a deed of trust upon all of their property.

The acceptance of the charges and the taxation upon income was conditioned upon the franchises and privileges set forth in the VIII section of the charter granted by the State of Illinois.

XII.

The Supreme Court of the State of Illinois, in deciding upon this case, said: "It is insisted by appellants that the statute regulating these tolls is a violation of the contract with the corporation found in the charter. This depends upon the construction of the terms of the charter. Without a charter, the corporation had no capacity to do any business whatever; no power to make contracts, to sue or be sued. This charter confers their functions and prescribes the mode of their exercise."

This is conceded by the plaintiffs.

The court proceeds: "A natural person, having permission to cross the public highways, and owning the land necessary, may, without a charter, construct and operate a railroad, and has power to establish such rates of tolls for the conveyance of persons and property upon the same as he may from time to time determine, and may collect the same for his own use."

This we are not disposed to dissent from now. The court proceeds: "He is not, however, beyond or above the legislative power of the State, to pass laws prohibiting EXTORTION, and, within reasonable limits, to define what shall be deemed EXTORTION."

In case the "natural person" above mentioned did not carry on a public business, and did not undertake the employment of a carrier for reasonable hire or reward, but was disposing of his own property and labor, it would hardly be in conformity to natural justice to call him an EXTORTIONER for putting his own price upon his own work. In the case supposed, the owner owed no legal duty to the freighter or the passenger, and either might have refused any relation of contract for service. But if the "natural person" had been invited by the State to dedicate his property and labor in the public employment, with a contract to determine his rates from time to time, and to collect

them, the existence of an absolute power to alter them at the pleasure of the legislature under a penalty, without any reservation or notice, does not seem to be a self-evident proposition. The first impression is to the contrary. The Court proceeds to say: "The charter of this corporation is beyond a doubt a contract, under the adjudged cases in this and other States, by which the corporation acquires the powers and functions to transact such business in the mode prescribed; but it is the opinion of the majority of the court that all this is, by necessary implication, subject, as all citizens are, to the legislative power of the State to define, prohibit and punish *extortion*. The reasons and authorities leading to this conclusion are presented and discussed in the case of Ruggles vs. the People, 91 Ill., 255. The learned author of this opinion finishes by announcing his own dissent from the conclusion of the majority of the court in the case decided, and the authority cited therein.

The State of Illinois cannot repeal the charter of this corporation, nor impair the obligation of any of the material terms of the engagements, nor defeat the purposes and design with which corporate rights were invested. Since it has been the habit to find incommutable rights in the clauses of legislative enactments of this description, unquestionably mischief has resulted; and we do not feel at liberty to go beyond the principles settled in cases which have a solid foundation to rest on. In this charter there is found palpable evidence to the effect that the parties fully understood the nature of their engagements, and the results to which they conducted and accepted them in soberness and good faith. The hostile legislation of 1873, with its extravagant penalties and menacing confiscation, is simply an overbearing and vexatious demand for a repeal of the contractual engagements of the State.

XIII.

The opinion of the Supreme Court of Illinois in reference to this charter is not unanimous. The conclusion that a charter

like that granted to the plaintiff is not revocable or alterable by the grantor at pleasure is not admitted as certain, nor is it denied that the charges made by the company were justified by the terms of the charter, and the by-law of the board of management. The organization of the corporation, its efficiency and activity, are not complained of. The assertion of the Court is that the VIII section of the charter is not obligatory upon the State as a contract assented to by her. That the State has a supervisory authority over this corporation of so high an order that it was quite impossible for her to surrender a power to punish her for any misdemeanor; that extortion is a misdemeanor, and that the corporation may be punished. The company, in the performance of its function of a carrier, has charged for service on the railroad, in the transportation of a shipment of salt, some three dollars and fifty-five cents more than a board established by the State had decided to be reasonable. Each board had its organization under a State law. The State, upon considerations acceptable, proposed the organization of the first board, and contracted to abide the judgments of that board. The second board was organized to dissent and to contradict, and to furnish *prima facie* evidence in all courts that the first was extortionate; and the courts were told to take preponderance of testimony, as a jury should estimate the testimony. Within any reasonable definition of what the police powers of a State are, this regulation is not one of police. It is a specimen of interfering regulation with ordinary business that can rarely be justified. In this case, unjustifiable because this very disagreement and discordance between forwarders and carriers, is the diuternal condition that all observe. These penal and punitive statutes upon the construction of contracts, and the introduction of courts and political boards, and popular actions, imply a desire for judgment without accompanying justice. The penal character of the legislation does not place it beyond impeachment.

New vs. Rosehill Co., 70 Ill., 190.
Passenger Cases, pp. 423–427.
Comm's vs. Farmers' Bank, 21 Pick., 542.
C. B. R. Co. vs. Iowa, 94 U. S., 155.

The case last cited from the reports of Pickering makes a statement of the protection accorded to corporate charters.

"It may be conceded," says Chief Justice Shaw, "that a charter is to be considered to be a contract between the government, on the one side, and those who accept the act and their successors, on the other side; and the corporate power granted cannot be revoked or annulled by an after act of legislation, unless a power has been reserved for that purpose, or with the consent of the corporation.

"But, in applying this rule practically, it is necessary to consider how far and to what subjects this contract extends. It is clearly a stipulation on the part of the government that the corporation shall be and continue a corporation for an indefinite time, or for a term limited in the act, unless sooner forfeited for some cause recognized by existing laws as a cause of forfeiture; that their constitution, organization and mode of action, as prescribed by the charter, shall not be annulled or changed by the legislature; that members shall not be added or removed; that modes of election, expulsion or suspension of members shall not be altered; and that whatever belongs to their organic constitution and action as bodies politic shall continue and be determined by the terms of the charter. *In* addition to which, the *powers specially granted to them are* not to be withdrawn or diminished."

21 Pickering, R, 542.

The only inquiry to be made in this case is whether the powers enumerated and conferred by the VIII section of this Act be of the class which must be possessed in confidence by the corporation, permanently, without diminution.

XIV.

The Act of Congress approved in 1850, and the Act of the General Assembly in 1851, respectively, signify the aim of both governments to substitute for both a corporation or a person competent to undertake the completion of the railroads designated by both in their enactments at their own expense, and that the substitute should bear all the burden of the undertaking upon the inducements proposed by each in the form of laws. There are two distinct characters which the corporation must successively assume and fulfil under this charter. The surveys, location, construction, completion of the works; the selection and sales of the lands appropriated by Congress; the selection of sites for depots, stations, warehouses; the arrangements of tracks, turn-tables, engines and structures—all belong to a contractor, builder, engineer or manager.

When the railroads are finished and opened for use, the corporation becomes a public agent, a common carrier, and the railroad a public highway. In this charter the State provides for all of these primary works to be done by the company in determinate periods; and, in the final result, demands a first-class railroad to be made, and to be equal to the Boston and Albany Railroad. In case of any failure, the single word FORFEITURE is all that the State permits herself to speak to the delinquent contractor. There was no failure in this instance, and when the work of construction was done, the powers needful to carry into effect fully the purposes and objects of the Act became active and in exercise. As a substitute for the State, as her functionary, there were privileges, immunities, franchises, faculties, to be employed by the corporation, or, rather, by the board of directors; the Governor of the State of Illinois, who was to be a director, *ex officio*, perpetually, voting in person, or, by proxy, being a member. It was at this time that the board

of directors were first called upon to establish such rates of toll for conveyance of persons and property upon the railroads as they should from time to time determine, and to levy and collect the same for the use of the company.

The expenses, risks, perils, responsibilities of the transportation of persons and property being charged on the corporation entirely, there was simultaneously an authority to be exerted to establish the rates of toll, and an authority to levy and collect them for the company. If the State had performed for herself her own function of providing public highways, this corporation might have been employed as an agent of construction, equipment, management and operation. The State would have defrayed all of the expenses, and would have determined and directed the rates and the collections of tolls and of fares. In this charter the State has substituted the corporation for self in full usufruct of the railroad, and with powers, privileges and franchises to collect the tolls for the company, but taking the obligation of the company to pay semi-annually from the gross earnings five per centum. The relation between the State and the company, as the manager of transportation and as the sole proprietor of the highway projected by the two governments, and organized and put in order for the public employment and use, have been defined in the sections of the charter seven and eight, eighteen and twenty-two.

The parties in these sections settle that this public highway shall be maintained and operated by the company and the terms of operation, and the charges upon the company for the various assistance the State has rendered to the company or may render. The parties deal on equal terms, and make a commutative contract. In the language of that contract, in respect to the precise matter of service to be performed, and expenses to be incurred, and responsibilities to be assumed on the part of, and accountability to be exacted from, and contributions to be paid by the company, nor in the compensation and retribution

to be afforded to the company by the State, do we find reservations, exceptions, or a power to alter or reform the terms of the contract. The language is clear and without qualification. The terms imply a continuing authority, a freedom from control, an unquestioned enjoyment, and a certainty of support and assistance in the exercise of power, privilege and franchise for the common benefit of the State and company which share in the gross income derivable from every receipt of pecuniary profit. The cases on the subject are collected in the text-books, and we refer to these rather than collect the cases in a heap in the brief.

Pearce on Railroad Corp., 448–450.
Sedgewick on Const. Law, 619.
Burroughs on Tax, 427.

XV.

In the law of railroads in Great Britain we have not found cases relative to the power of Parliament, or the administrative departments to change the terms of the charter of the company. The writers on the subject of railroads tell us that the tolls and charges on all railroads are limited by the special acts. But that practically, this limitation has no value, for the rates thus fixed are generally higher than the companies find it to be their interest to charge. Without a power to revise the tolls periodically, according to the altered conditions of a railway, any attempt to fix them by anticipation must be unprofitable. There were instances of charters when a maximum of aggregate profits for a certain period would authorize a revision and reduction of the tolls, but no experience of such a phenomenon has been reported. Neither has there occurred a case of alteration of a charge allowed by the charter without the consent of the company.

Amos on English Const., pp. 129–131.

XVI.

The claims of the State of Illinois and of the Supreme Court in the opinion delivered in this cause is that the power conceded to the plaintiffs is unreasonable; that it subjects the public to unreasonable exactions by a corporation which respects its own interest; and that it frequently happens that the interest of the public is not identical with that of the company; that there can be no compromise of the interest of the public; that all the rights and powers and estates of men over property must be surrendered for the public good; that every disposition contrary to the public good is an infringement of the public right to the supreme good, and when these are involved, no stumbling-block can disturb the public in their onward march to the enjoyment of their inalienable privilege—a supreme good. The contracts freely made, punctually performed, so as to obtain right, privilege, power, immunity, franchise, cannot be held in any estimation if their employment does not assure the production of the most good to the greatest number.

The constitution and the laws under which these works were finished, and have been managed for a quarter of a century, have not provided for such conditions of change. The Chief Justice of this Court, with the sanction of a majority of its members, affirmed the following contradictory conclusion about the time these works were finished: "That whether such contracts should be made or not is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty, which has not been surrendered by the adoption of the Constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal of this country that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon

the ground that they may make contracts ruinous or injurious to themselves. * * * * The Chief Justice, in the same opinion, says: "Experience may prove the contract to be a public injury. Yet, if the contract was within the scope of the authority conferred by the constitution of the State, it is like any other contract made by competent authority binding upon the parties. Nor can the people nor their representatives, by any act of theirs, afterward impair the obligation."

O. L. T. Co. vs. Debolt, 16 H, 416, 428–9; 8 Wh., 1, 6 How, 691.

It is unquestionably true that a State may embody in a statute an overture for an executory contract, which, on its acceptance by the person to whom the proffer is made, may be denominated a contract; and that, if there be an acquisition of property or right under this contract, a subsequent act to annul or impair the right or to weaken the title would be inoperative. In the case before this Court, all the constituents of a contract deliberately made and fully performed on either part are exhibited to the court in the transcript before it. There had been possession and enjoyment on both sides of the fruits of the contract for a score of years when the proceedings in this cause were commenced. The State, in this condition of possession and quiet enjoyment by the corporation, asserts a new authority over the contract, and abrogates a material and essential clause of the contract, and introduces a fundamental change in the relations of the parties.

The legislature supercedes the board of directors in their power to direct and to determine the rates of toll under the VIII section of the charter, and empowers another board to be appointed by the Governor, with the consent of the Senate, to establish maximum rates, which the corporation must accept for their direction. The State, thereupon, establishes an ascending, sliding scale of forfeitures, to be inflicted upon the corporation

for employing a power conferred as a motive to take upon herself the performance of the tasks of the State she had declined to undertake and fulfil. For the first transgression the corporation may be fined from $1,000 to $5,000; for the second, from $5,000 to $10,000; for the third, from $10,000 to $20,000; for the fourth, from $20,000 to $25,000; thence the fines are fixed at $25,000 for each offence, but there is a reserve power of entire confiscation of corporate rights and property to be applied if occasion requires. The Act of 1851 was framed in an alluring, enticing, Delilah mood.

In 1870, when the new constitution was framed, there are marks of some estrangement on the part of the State, but the separate article shows constancy and a stolid purpose to maintain the conjugal bond indissoluble; but the Acts of 1873 denote a separation, if not a contemplated use of poison. The legislative aspects of the case plainly display the Aryan descent of the law-makers of Illinois. The law or command or judgment of the GREAT KING, when duly sealed, was immutable and irrevocable; but should the potentate change his will, he altered the result by a grant of a license to those affected by the law, to cause to perish all the power of those who were concerned to support it, and to take the spoil of them for a prey. It is not denied that the charge made by the corporation and condemned as an extortion originated in a by-law sanctioned by the Board of Directors previously to the Act of the Legislature of May, 1873. This was the regular mode for determining the rates to be collected. The Legislature has established another board without the consent of the company and has armed them with authority to resist the corporation to its destruction through penal enactments. This we claim to be *ultra vires*.

Passenger Cases, pp. 423–7.
New vs. Rosehill Co, 70 Ill., 190.
P. W. B. vs. Bowers, 4 Ham., 506.
Thorp vs. B. & C., 27 Verm., 140.

XVII.

We have shown that the provision of the VIII section of the charter, in respect to the establishment of rates, is in purpose and in effect a contract between the State and the corporation upon an essential subject, without a settlement of which there would not have been completeness in the agreement between these parties. The agreement operates to confer rights of property, of possession, and of the use of property and faculties and franchises, and powers lawful in themselves, and proper for the acquisition of property.

They are *contracts* enforceable at law, and which have been enforced in the daily administration of the railroad for twenty-five years. The substitute proposed by the State in the Act of 1873 is in form and legal effect identical with the other, except the State assumes the exercise of a power expressly conferred on the company and excludes the company from its exercise.

The clause in the Constitution of the United States on the subject of contracts is analogous to that clause which does not allow of laws to deprive a person of life, liberty and property in possession and enjoyment without due process of law. The purpose of the prohibition is the same. This latter clause was a guarantee of personal rights, and of rights of property in possession and enjoyment, from arbitrary, encroaching and privative legislation.

In respect to contracts, the protection is of rights of action, and against disabling statutes to impair such rights as shall arise from time to time out of contracts. The State of Illinois had plenary powers for the construction of her public highways. It is among the primary functions of government to foster intercommunications, and to furnish the means by steady improvement of the channels, whether natural or artificial. The powers of taxation of property, and the personal labor of

virile population, are at command for the purpose. The United States granted the right of way and a liberal gratuity of the public domain as their contribution. The State could exact tolls or rates from all who used it for reimbursement, and might have managed it. The whole subject was committed to the State for government and administration, and to settle a public policy to which personal and private interest would be subordinate. The State, with a knowledge of her resources and dominion, declined to take upon herself the responsibility, the entanglements, the expenditures, the hazards, the connections, the contingencies of failure, confusion and disturbing influence which might follow. She convokes to her counsels and to her conferences individuals, without reference to their nativity, places of residence, or her own relations with them. She associates thirteen of these, and endows them with powers, privileges, immunities, franchises, capacities and property, upon the contract to do and to perform what she had declined to do for herself. This contract consummated under the auspices and encouragements of a law designed to be submitted to the corporators for acceptance as a contract; accomplishing, by its precise terms, a mutual interchange of property, rights, obligations and responsibilities, requiring from the corporators who might accept it a continuing, burdensome and aleatory employment; the benefits to accrue to the State being continuous and assured for the entire duration of the corporation, surely cannot be annulled, altered, impaired by the act of one of the parties. The contract confers rights, the State acting, for her population has imposed obligations for her to do and to forbear. The contract cannot be annulled by any of the Persian methods of nullification or avoidance.

XVIII.

We do not deny that the business of transportation of property and of persons upon the public highways of a State is

a matter of public concernment, and a legitimate subject for legislative regulation and supervision. The ordinance for the government of the Northwest territory in 1787; the laws applied to the Southwest territory; to the territories acquired from France, Spain and Mexico; the articles for the admission of new States into the Union, have dedicated to the citizens of the United States all the navigable water courses as common highways. The laws and usages of the States have done the same for the common roads. The laws applicable to them, and the power of regulation and supervision, as well as of use, naturally comprehend the new modes that come into employment for the same public ends. The decisions of this court have been full and comprehensive, and we refer to them without comment.

Mum vs. Illinois, 94 U. S. R., 113.

Railroad vs. Iowa, Ibid., 155.

The same observations apply to the management of and business done on them. The law comprehends, under the name carrier, all who, for a determinate price, habitually transport persons or property. This embraces transport on railways, steamers, sailing vessels, coaches, boats, cars, and we may add balloons.

This last mentioned mode was used for five months at Paris in the years 1870–1871, where communication with the outer world was conducted through aerostats, who undertook to carry over the lines of the besieging army persons, money for wives and children who were separated from their husbands, correspondence and articles of prime value from exposure to the invading enemy.

Code Civil; Colmet de Santerre, t. 7, p. 345.

25 Laurent, No. 518.

There is such concordance between the opinions of this court and those of the French jurists relative to the position of the vast and complex aggregation of capacities and powers that

exist within railroad corporations and the State or public, that we shall submit the latter to the court. The construction of railroads in France is made under the direction or supervision of the minister of public works; there is a concession, and the interest of the company terminates at the end of a term specified. The road then becomes the property of the State; they form a part of the public domain. They are not vendible, nor are they subject to taxes. Their rates are determined in the concession. Their employment is to transport persons and property on the railroad; this is a public service. It is of the nature of the interest to which such services refer that the public contract cannot be compromised. This furnishes the explanation for all the powers of government in the matter of police, and cannot be impaired for any cause. The interests of society are above and superior to the ordinary or common right. The rights of property are subjected to the social right in the manner prescribed by the laws. Every disposition, every convention in which the interest of the public order is an infraction of this supreme right. This doctrine, these jurists affirm, has nothing irreconcilable with respect to the agreements freely made in the sense that at least they do not imply any annihilation of the right which can grow out of the contract—it only transforms it into a right to an indemnity—application was made to the concessionarys of the canals. The tariffs of rates of the canals from Nantz to Brest, Duberry, du Nivernais, and to the Loire, were fixed in the concessions in August, 1822. It was stipulated at the same time that the tariff could not be modified without the mutual consent of the government and concessionary companies, and that in no other case could there be an addition without a law; that is, the administrative authorities could make no addition.

The government proposed a change; the company declined to consent. The government persisted, and lowered the rates. Their conclusion was that the government must make an

indemnity. There were long negotiations. The result is thus stated: "It appeared that the government could not satisfy the requirements of the companies. However, the new treaty with Great Britain demanded that the tariffs should be reduced as much as possible, in order that our products should be transported as cheaply as possible to sustain a competition with the products of Great Britain. It became necessary that the government should have, in respect to the canals, the entire control. In consequence, eight laws of the 28th July and 1st August, 1860, authorized their EXPROPRIATION."

44 Dalloz, Jurisp. Gen., pp. 716–7, Nos. 35, 37, 39.
Verbos Voirie, par Eau, 3.
Dufour, Droit Adm., pp. 261, 257, 262–3.

It does seem that the principle lying at the foundation of the action of the State of Illinois in the enactments of the charter has been disregarded, after the aim and object of the State in their enactment had been attained by the accomplishment of the work. The aim was to procure the construction of a work of vast proportions, because it was a work of public utility. The State, in their estimates of the work, made concessions found to be burdensome. Experience has found that the tariff of rates most productive to the company is not most beneficial to the State.

A priori, this was manifest, and experience has demonstrated that this is true. The probability is that there need not be any loss to either party. But the corporation is entitled to a fulfillment of the contract, and nothing can be more unreasonable than the Act of 1873.

The State assumes that she is the sole arbiter; that she may at will destroy the work she has created; that she may pass confiscating enactments, and can, if she pleases, attaint the corporation if there be a denial of her extreme demands.

The fundamental law of the United States is that life, liberty and property are to be free from arbitrary legislation, whether from Congress or General Assembly; contracts cannot be impaired by General Assembly. It cannot be constitutional legislation that makes it a crime to employ property under the precise conditions inserted in the grant made by the State. Intercommunication is necessary to society, and routes are essential to social existence. The various classes of routes, from the foot-path or trace to the railroad, marks the progress to the present condition of social and commercial intercourse. The most exciting inquiry of the day is the economical question of construction, support and maintenance of ways of communication; and of these railroads, have the largest share of attention. We have seen that there is a diversity of opinion as to the means of providing for their construction, support and management. In Great Britain and the United States, the conclusions of Adam Smith in reference to expenditures for works of the kind have been adopted. "It does not seem necessary," he says, "that the expense of those public works should be defrayed from the public revenue, as it is commonly called, of which the collection and application are in most countries assigned to the executive power. The greater part of those public works may be easily managed as to afford a particular revenue sufficient for defraying their own expense, without bringing any burden upon the general revenue of the society." * * * * *

"When the carriages which pass over a highway or a bridge, and the lighters which sail on a navigable canal, pay toll in proportion to their weight or tonnage, they pay for the maintenance of those public works exactly in proportion to the wear and tear which they occasion to them. It seems scarce possible to invent a more equitable way of maintaining such works. This toll or tax, though it be advanced by the carrier, is finally paid by the consumer, to whom it must always be charged in

the price of the goods. As the expense of carriage, however, is very much reduced by means of such public works, the goods, notwithstanding the toll, come cheaper to the consumer than they could otherwise have done, their price not being so much raised by the toll as it is lowered by the cheapness of the carriage. The person who finally pays this tax, therefore, gains by the application more than he loses by it. It seems impossible to imagine a more equitable method of raising a tax."

Smith's Wealth of Nations, Part III, Art. II.

Adam Smith speaks of the property in tolls, and that they should never be separated from the private interest which is not involved in a necessary and active obligation to keep the property in order. He tells of the Canal Languedoc, which cost £900,000, and the King, Louis XIV, to secure the constant repairs as the most likely method, made a gift of the tolls to Riquet, the engineer who had planned and conducted the work. At the date of the work of Smith this family owned the tolls and kept the canal in order."

Wealth of Nations, supra.

The railroad corporation constructs and equips and operates the railroad for tolls and fares, to be imposed and collected under a tariff to be made by a board of directors, of which the Governor of the State is perpetually a member. This contract was the basis on which the railroad was built, and the management conducted for some fifteen or more of years. In 1873, the legislature says you shall maintain, support, repair, equip the railroad, but WE shall fix rates for *our constituents are to pay.*

The eighth and the eighteenth sections of the charter of the plaintiff probably commanded the diligent examination of the General Assembly. They embody the pecuniary equivalents that the respective parties conceded, and the essential agencies

which were agreed to for their realization. On the side of the corporation, there was to be furnished capital, skill, commercial activity, enterprise and responsibility, and, on the part of the State, powers, franchises, privilege and capacity were liberally granted to be favorably regarded by the public authority. The aim of both of the parties was that the railroad should yield a revenue. A revenue was needed to compensate for the contributions of whatever kind, intellectual, industrial or material, the corporation should make. There is a stipulation that the railroad shall be equipped and maintained at a high standard of excellence. There is a reservation of a fair rent for franchise, privilege and power. To secure the revenue, powers of occupation, control, management, are conferred with but few restrictions. Nor did the General Assembly seem to apprehend that the revenues would be excessive. There is in the constitution of 1870 a hope implied that at some time taxation might be confined to the charges of transportation, and that Illinois would have an immunity from taxation. The receipts are dedicated for the purpose of the support of the State government exclusively in the constitution of 1870. The charter confers the power and imposes the duty, and prescribes the mode for determining the tolls and fares of the company. The General Assembly must have understood that a railroad corporation, generally, considers her own interest, and that the charges are fixed, so that a profit will enure to the company. The rates, to attain that aim, may not be those affording most ease to the public. There may be a fair difference of opinion as to the rates most suitable to reconcile all interests involved in the railroad management. There may be disturbing causes which may call for alterations.

The State secured her interest by requiring the Governor of the State to be a director. She consented to the delegation to the board of directors the power to determine and to collect the rates, and to reserve a share of the proceeds.

Tolls similar to those called into existence by this charter have had centuries of existence and an interesting history. Under the Roman empire, the public roads were under the charge of officers of the empire—*Curatores Viarium*—all persons were compelled to contribute money or work, and there was upon the roads a charge paid for passage over them. In the overturn of the Roman empire, the roads were seized by the feudal chiefs, and the rights to tolls were appropriated by them as a legitimate fruit, and their power was enormously abused. Every avenue and way of intercourse was taken possession, and held by them to make exactions. The kings of England and France ultimately claimed the roads as a part of the public domain, and the tolls as a royal franchise which could not be enjoyed by a subject, unless by an express grant, or by proof of immemorial possession. Whatever properly appertained to the sovereign as paramount was thus withdrawn from the patrimony of his nobles. Fairs, markets, ferries, highways, navigable waters, ports, bridges, were recovered to form the domain of the sovereign.

Championiere des Eaux Courantes, pp. 536, 544.

In the statute of Westminster commented upon by Coke, it is declared that, for fairs and markets, the toll must be reasonable, and not "outrageous," and that the grant would be revoked for such an excess.

II Coke Inst., 219–222.

Truman vs. Walgham, 2 Wilson, 293.

But cases where the toll has been objected to as "*rank*," where there is a continuing consideration, are unobjectionable.

Jenkins vs. Harvey, 5 Tyrwhitt, 871.

Stamford vs. Pawlett, 1 Cr. & Jervis, 400.

Gunning on Tolls, 27.

Regina vs. Salisbury, 8 A. E., 716.

The case of Lawrence vs. Hitch, L. Rep., 3 Q. B., 521, is a case of tolls held by immemorial possession, and sustained by proof of grant within memory, where the validity of tolls as property passing by grant is established, and where the reasonableness of the toll is considered.

See Bryant vs. Foot, 3 L. R., supra, 497.

Other cases show that easements similar in their character cannot be injuriously affected, except upon an indemnity being secured to the owner.

Queen vs. Cambrian Co., L R. 6 Q. B., 422.
Brett vs. Beales, 10 B. & C., 508.
Mayor of Exeter vs. Warner, 5 A. & E., N. S., 804.

Wherever these rights in property, or to arise from the employment in property, are established by grant or by immemorial possession presumptive of a grant, no government, whose constitutional obligation it is to protect property, has abolished, or materially altered by legislation, such property without an indemnity. The *insucken multures* for service at the mills in Scotland, on account of lands astricted or thirled to the mill, were removed by commutation assessed by a jury under the Act 39, George III, Ch. 5. Similar rights in England have been maintained by the Courts.

3 Black. Com., 235. Douglass, 208. Cro. Eliz., 203.
Mayor vs. Coates, 4 Madd., 447.
Woolrych on Watercourses, 308–398.

The discussion we have had and the cases cited remove any impediment to the allowance of the claim of the corporation of powers granted in the VIII section of the charter, according to the plain import of the words. The State proposed to organize and to develop a system of railroad transportation through a corporation of her own creation. The power to determine rates

and the duty to establish them is carefully and exactly defined. These rates become operative only when a forwarder accepts the conditions. The law imposes no constraint upon anyone to make use of the railroad for transportation. The State has only provided opportunities. In the case of police regulations, the mandate is peremptory obliging everyone, and none can contravene it. The forwarder may use any mode of transportation he may select, or may retain his property under his own control. The State has arranged that the board of directors shall determine the rates, and shall collect them for the use of the company; this is a part of the charter. The General Assembly, in the adoption of such charters, exercises several faculties of a nature essentially different and distinct. In the enactment which affirms that two lines of public highways shall be constructed, that these shall be subordinated to the use of the United States for transportation, according to the demands in the Act of Congress of 1850, and the grant of authority to construct such railroad, with powers of appropriation, and in the penalties for the protection of the property from injury, the State exerts her political power, her sovereign powers, so to speak.

Besides sovereign or political power, the State has power as a civil corporation. She acquires property by donation, bequest or purchase, and transfers it by sale or other form of appropriation. She contracts for supplies, for labor, for care and diligence, skill and industry in her business. She may be a public carrier, as the proprietor of railroads, canals or vessels for transportation, and, without special laws to the contrary, would be answerable according to the common law. This has been established in respect to Belgium.

25 Laurent, Droit Civ. Du Transport par Chemin de Fer, 535–540.

When the State of Illinois arranged with the corporators of the Illinois Central Railroad Company to carry on the work of

construction of the railroad, and to perform other duties in reference to the public lands, and finally to superintend and to conduct and prosecute the commercial business of transportation on the terms specified in the charter or articles of agreement, the State reserving a share of the results, the State and the corporation were dealing as civil corporations, and on terms of equality under the law. The State cannot throw her sword into the discussion, and solve questions by its arbitrary use.

If there be a natural, social, constitutional right of every person to travel on a railroad upon what are termed reasonable rates, and any railroad violates this private and personal right, or if transportation of property on railroads be determined according to the model furnished in the Act of 1850 by the United States for all of their citizens, these rights may be asserted by the person injured. This does not justify the State to annul her own contract, and to punish as criminal that which she invited and authorized to be done. If rates had been established in the contract, or provisions had been made for readjustments of rates, neither party could object. But the principles of modern science oppose all fixations and limitations of prices by acts of public authority; the regulation of interest on money, or the price of merchandize, or the assises of bread and meat, or the fees to officers, or fares on carriages and canals and railroads, as interference with liberty and free competition.

Unquestionably the concentration of the great powers and faculties that railroad management admits of, and perhaps requires, has become a political question of importance and interest. Those questions cannot be adjusted in a suit like the present. The question here is one of vested right existing in contract, and constituting a property in possession and enjoyment, held under the sanctions of legislative enactment, promoted by a constitutional injunction. The command in the Act conferred to all Courts was given at the time that the Act should be favorably considered.

We ask from the Court a favorable consideration.

The opinions of the Courts in Illinois, and the requirements of the constitution of 1870, and of the statutes made to enforce it, imply that railroads are not deemed to be in any large sense corporate property, but are the property of the people for their business, and to promote their social and commercial intercourse, and their pleasure, recreation and enjoyment. They are called the people's highways, and that the salvation of the people being the supreme law, the matter to be considered of in connexion with them is the people's salvation.

O. & M. R. Co. vs. McLelland, 25 Ill., 144.
C. D. V. R. vs. Smith, 62 Ill., 275.
N. W. R. vs. People, 56 Ill., 377.
Galena R. vs. Dill, 22 Ill., 204.
Sanford vs. Railroad Co., 24 Penn., 380.
M. I. Co. vs. Merchants' Bank, 6 H., 381.

Railroads certainly are instrumentalities which fulfil the purposes and aims for which public highways were constructed and maintained. Their connection as such with commercial and social intercommunication, and the dependence of the State upon them for certain and rapid transportation for persons and things; the immense property which is placed under the control of railroad corporations for removal to distant markets apart from the owners; and the necessity for safety and security of transportation of men and women, compels the exercise of legislative superintendence, oversight and regulation to insure punctuality and fidelity in the performance of the obligations they are subject to. That mysterious police power of the State finds employment in the close observation of their management, and cognizance of delinquency or neglect. But these facts, and all other facts connected with construction, maintenance or management of this railroad, do not prove that it is not corporate property, nor that it is in any sense of property or of right the people's highway. The grant to this corporation is of

a right of way over land to be appropriated to the *sole use and control* of the company for the purposes of the grant. This exclusive use is to construct, maintain, and complete and preserve and operate, railroads of their own construction and equipment. Exclusive occupation and control, with powers, privileges, franchises, immunities to make operation and control effectual, implies ownership and rights of property. The ownership is not perfect. The corporation cannot sell, lease, mortgage nor assign this property. The property must be managed and employed continually, incessantly, in a certain way—for purposes and objects contemplated and plainly declared in the grant. It must perform a service of public utility under the control, management, authority of this corporation, and none other. The corporation is bound to the railroad. The name of the corporation betokens their function and their title. The corporation has undertaken to transport, on terms of equality and impartiality, the property or the person of any and all persons who shall offer, and that may be offered, on the terms of making payment at such rates of toll as the board of directors may from time to time determine and make known in a by-law framed for that purpose. The business the corporation conducts is so general in its immediate relations, and is so large in its scope, including, as it does, all who are willing to participate with it, that it may be described as a public business; but, as a matter of fact, every passenger obtains his ticket and his seat, and every forwarder his bill of lading, distinct and apart from every other. And corporation and customer are reciprocally responsible for neglect and default. The Courts of the State are open to both on the same terms.

The State is astricted to the corporation in the same manner as to the other juridical or to natural persons. The State obtained the corporation to prepare the works and constructions for this service, and procured the carrying on the business by them, and under the terms of a written contract, which of itself

was to be a law to the parties, and, which being clothed with the form of a law by the legislature, became a law to all the inhabitants of the State.

Let us concede the facts to be that Cairo, in 1851, the date of the contract, was a flourishing city, well built, protected from floods, had a prosperous commerce, and with fair prospects, and that now she is a marsh, and reduced to a population of some three hundred souls; let us concede that all the years of plenty in the Egypt that borders the railroad were enjoyed before earth was broken by this company; let us admit that at that date, Chicago was the queen city of the West, more important than all of the others, reaching to half a million and more of population, and that she is recorded to have only thirty thousand of inhabitants, we cannot, even for these calamities, admit that the public salvation has become so supreme a law as to justify the State to impair the obligation of this contract.

The agreement was that the board of directors of the company, the Governor of the State being one, should determine the rates for toll and fares for transportation.

The State, under the assumption of some other supreme law than the constitution, proposes that a board appointed by the Governor shall determine and direct rates called maximum as a *control* over the corporation. If the rates appointed by this new board be larger, or the same as those fixed in the by-law, they are immaterial. If the maximum be less than those in the by-law, the State says there follows forfeitures. No such provision is in the charter; no such custom is known to the common law. There are instances of the maxima rates and prices established by authority mentioned in the history of Europe, but unfrequent. The statute concerning labor in Great Britain, the laws of maxima of Philip IV of France, and of the National Convention of France during her revolution, are surely not examples to be followed. The principle of the Acts of 1873 would justify laws of the same kind.

In 1793 the National Convention prescribed the prices for bread, meat, malt or vinous liquors, fuel, light, clothing, metals, transportation, and all materials for their production or employment, with penalties quite in the spirit of the Acts of 1873 of Illinois for any evasion or violation.

The commission which reported the law acknowledged their difficulties, and that some had doubts and were in alarm. "In ordinary times," the commission say, "prices are naturally fixed by the reciprocal interests of buyers and sellers. This standard is unerring. It is vain for the best of governments to interfere with it. However enlightened and well disposed the government may be, they can find no standard more just, and they incur a risk by interference with it.

"But when a general conspiracy of malevolence, perfidy and fury without a precedent has been formed to destroy this equilibrium, and to starve and to despoil us, *salus populi suprema est lex*, society has the right to repel this war on commerce by tyrants to re-establish and assure with a strong hand the balance which ought to exist between our productions and our necessities."

Histoire Parlementaire de la Revolution, to. 29.

We encounter here the extreme conditions that we suppose to exist at this date in the State of Illinois. The sequel of this history is instructive. The law of the maxima remained in force about a twelvemonth. It was repealed. The National Convention made a proclamation that: "Reason, equality and the interest of the Republic for some time had reproved the law of the maximum. * * All enlightened men know that the law of the maximum is pernicious to commerce and agriculture. The more rigid the law, the more impracticable it becomes. Oppression in vain takes a thousand different forms; it encounters a thousand different obstacles. * * * It is to

108-541

IN THE

OFFICE SUPREME COURT U.S.
FILED
MAR 31 1883
JAMES H. MCKENNEY, CLERK

Supreme Court of the United States,

OCTOBER TERM, A. D. 1882.

Illinois Central Railroad Company, *Plaintiff in Error,*

vs.

The People of the State of Illinois, *Defendant in Error.*

} ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

—:BY:—

JNO. N. JEWETT.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1883.

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Plaintiff in Error,

vs.

The People of the State of Illinois,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

—BY—

JNO. N. JEWETT.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 108 RANDOLPH STREET.
1883.

IN THE

Supreme Court of the United States,

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Statement of the Case.

The charter of the Illinois Central Railroad Company was passed, as a general law, and became effectual by the approval of the governor of the state, on the 10th day of February, A. D. 1851. The last section of it (Rec., 39) is as follows:

"Sec. 27. *This act shall be deemed a public act, and "shall be favorably construed for all purposes therein ex- "pressed and declared in all courts and places whatsoever, "and shall be in force from and after its passage.*"

The 23d section of the act required an acceptance of it by the company. This acceptance was formally made within the time limited. (Rec., 39.)

By the eighth section of the charter it was provided as follows:

Sec. 8 * * * * * * * "The board of direc- "tors shall have power to establish such rates of toll for "the conveyance of persons and property upon the same "as they shall, from time to time, by their by-laws direct "and determine, and to levy and collect the same for the "use of said company. The transportation of persons "and property, the width of track, the construction of "wheels, the form and size of cars, the weight of loads "and all other matters and things respecting the use of "said road and the conveyance of passengers and prop- "erty, shall be in conformity to such rules and regulations "as said board of directors shall from time to time deter- "mine." (Rec., 30.)

The eighteenth and following sections provided that, "In consideration of the grants, privileges and franchises "herein conferred upon said company for the purposes "aforesaid, the said company shall, on the first Mondays "of December and June in each year, pay into the treas- "ury of the State of Illinois five per centum," (by Sec. 22 increased to, at least, seven per centum) "on the *gross or* "*total proceeds, or receipts or income* derived from said "road and branches for the six months next preced- "ing," etc.

The constitution of Illinois, adopted in 1870, contains the following amongst what are termed "*Separate Sections*":

"No contract, obligation or liability whatever, of the "Illinois Central Railroad Company to pay any money "into the State treasury, nor any lien of the State upon, or "right to tax property of said company, in accordance "with the provisions of the charter of said company, ap- "proved February 10th, in the year of our Lord 1851, "shall ever be released, suspended, modified, altered, re- "mitted, or in any manner diminished or impaired *by* "*legislative or other authority.*"

In 1871 the General Assembly of the State of Illinois commenced the passage of acts since generally known as the "Granger Legislation," the principal feature of which, and the only one here involved, as it stood when the alleged causes of action in this case, accrued, was granting to the governor the power, by and with the advice and consent of the senate, to appoint three persons to be railroad and warehouse commissioners, who should constitute a state commission, with authority to fix maximum rates of charges for the transportation of persons and property upon and over the various lines of railroad within

the state, and to prepare for each railroad company, schedules of such maximum charges, and providing for penalties against railroad companies for a violation of such schedule rates.

This State commission prepared a schedule of rates for the Illinois Central Railroad Company, which, not being complied with by the company, an action of debt (the form authorized by the "Granger acts") was instituted in the name of the People, etc., in the Circuit court of Douglas county, Illinois, to the October term, 1874, of that court, in which the company, in as many separate counts, was charged with thirty or more violations of the schedules of the commissioners. (Rec., 2 to 25.)

At the same term of said Circuit court, the case was submitted to the court, a jury being waived (Rec., 25), upon an agreed statement of facts, applicable to the seventeenth count alone. At the March term, 1875, the court rendered a decision finding the issues for the People, etc., assessing the debt at $1,000 (a penalty or fine under the law), and rendered judgment upon such finding against the company. (Rec., 26.)

The seventeenth count of the declaration (Rec., 14), charges in substance, that the company transported from Chicago to Tuscola, in said Douglas county, in March, 1874, seventy barrels of salt, weighing 20,000 pounds, and charged, demanded, collected and received from the shipper, for said service, the sum of $28.35, which was in excess of a reasonable toll and compensation, and was illegal and extortionate.

The agreed statement of facts (Rec., 26) contains:

1. An admission that the company charged and collected $28.35 for transporting the seventy barrels of salt

from Chicago to Tuscola, as stated in the seventeenth count.

2. An admission that the schedules of maximum rates, fixed by the railroad and warehouse commissioners, established the rates for the same service, at the sum of $24.80, and that the amount charged and collected by the company was $3.55 in excess of the commissioners' maximum rates.

3. That the rate charged by the company was the rate fixed by a by-law of the board of directors of the company in force at the time the service was rendered.

4. A reservation of a right of appeal, a denial of the constitutionality of the "Granger legislation," so far as involved, by the company on the one side, and an assertion of its constitutionality on the other. The charter of the company was made part of the evidence. (Rec., 28 to 39.)

The company appealed from the judgment of the Douglass County Circuit court to the Supreme court of Illinois, where, after some years of delay, the judgment of the Circuit court was affirmed in a *dissenting* opinion, shown in the present record. The writ of error in this case is prosecuted for the purpose of reversing the judgment of the Illinois Supreme court.

Assignment of Errors.

I.

The Supreme court of Illinois erred in refusing to hold and decide, that the provisions of the act of the General Assembly of the State, approved May 2, 1873, entitled: "An act to prevent extortion and unjust discrimination in "the rates charged for the transportation of passengers "and freights on railroads in this State, and to punish the "same and prescribe a mode of proceedure and rules of "evidence in relation thereto, and to repeal an act," &c., authorizing the appointment of commissioners to fix maximum rates, &c., and the action of the commissioners thereunder, *in their application to the Illinois Central Railroad Company*, were not in violation of the rights of the company under its charter, *as a contract* between the company and the State, and, therefore, void for repugnancy to the first clause of the 10th section of Article I of the constitution of the United States, prohibiting the States from passing any law, impairing the obligations of contracts.

II.

The act of the General Assembly of the State of Illinois, approved May 2, 1873, in those provisions of it, relating to the appointment of railroad and warehouse commissioners, with power *to fix reasonable maximum rates* for

the transportation of persons and property upon and over the railroads within the State, and the action of said commissioners thereunder, *in their application to the Illinois Central Railroad Company*, are in violation of the 8th section of the company's charter, and are an attempt on the part of the State, by legislation, to impair the obligation of the charter of the company, *as a contract* between the company and the State, and are, therefore, void on account of repugnancy to the clause of the United States constitution, which prohibits the States from passing any law impairing the obligation of contracts. And the Supreme court of Illinois erred in sustaining the provisions of said act aforesaid, and the action of the commissioners thereunder, as constitutional, and binding upon the Illinois Central Railroad Company.

III.

The legislation here complained of and above referred to, in its application to the Illinois Central Railroad Company, violates the first section of the fourteenth amendment to the constitution of the United States, and is, therefore, void, and the Supreme court of Illinois, having by its judgment in this case, sustained said legislation as valid, its judgment is erroneous, and should be reversed.

Points and Brief of the Argument.

I.

The legislation of Illinois, prior to the passage of the Illinois Central Railroad Company's charter, upon the subject of "internal improvements," considered with reference to its bearings upon the questions involved in this case.

II.

The prohibitions of the Illinois constitutions of 1848 and 1870, relating to the same subject, insisted upon as the result of the unsuccessful attempts of the State to construct and manage works of internal improvements, upon its own resources, as permitted to do under the constitution of 1818.

III.

The first part of the eighth section of the charter of the Illinois Central Railroad Company, including the *Proviso*, adds nothing to and takes nothing from the right of the corporation to make by-laws. The right to make by-laws for the management of its affairs, is an incident of every corporate organization.

Angell & Ames on Corp., Secs. 325, *et seq.*
Potter on Corporations, Secs. 70–1, pages 114–5.

IV.

The office of by-laws is to regulate the affairs of the corporation, and they are generally directed to the conduct and define the duties of officers and members as between themselves, etc.

Potter on Corporations, Sec. 76, page 119.

V.

The proviso in the eighth section of the Illinois Central Railroad Company's charter, qualifies and limits what precedes it in the same section, and no more.

Potter's Dwarris on Statutes, etc., 118.

VI.

The latter part of the 8th section of the charter contains a *direct* and *unqualified* grant of authority to the board of directors of the company to fix and determine the rates of toll for the transportation of persons and property.

VII.

The charter of the Illinois Central Railroad Company is a contract between the company and the State.

Illinois C. R. R. Co. v. *The County of McLean*, 17 Ill., 291.

Newstadt v. *Ill. C. R. R. Co.*, 31 Ill., 484.

Illinois C. R. R. Co. v. *Goodman*, 94 Ill., 292.

C., B. & Q. R. R. Co. v. *Iowa*, 94 U. S., 161.

VIII.

The Illinois constitution of 1870, prohibits the legislature of the State from in any manner interferring with or impairing the obligation of this contract.

First of "Separate Sections" of the Constitution of Illinois of 1870.

Sec. 23 of Art. 14 of same constitution.

IX.

The legislation of Illinois here in question, and the action of the railroad and warehouse commissioners under the same, in its application to the Illinois Central Railroad Company, are an attempt on the part of the State to modify and impair the obligation of the charter of the company, *as a contract*, and are, therefore, void, for repugnancy, to the first clause of Section 10 of Article 1 of the constitution of the United States.

X.

If the power granted by the charter to the board of directors to fix rates is qualified by an implication that those rates shall be *reasonable* (which is denied), still, the grant of power to fix *reasonable* rates would be absolute, and cannot be revoked or transferred without the consent of the company.

XI.

The fact that the law makes the commissioners' schedule of rates only *prima facie* evidence of reasonable maxi-

mum rates, does not relieve it of its unconstitutional character.

Plimpton v. *Town of Somerset*, 33 Vt., 283.

Francis v. *Baker*, 11 R. I., 103.

XII.

The power, conferred upon the board of directors of the company, to determine the rates of toll for the conveyance of persons and property, was a *material* part of the consideration for which the company, by the acceptance of its charter, agreed to pay a percentage of its *gross* earnings into the State treasury, and from its obligations to do so, legislation cannot relieve it. (Ill. Const. of 1870.)

XIII.

If legislation cannot *relieve from the obligation*, it is *powerless to take away the consideration* upon which that obligation is founded.

XIV.

If State legislation cannot recall a grant or violate a contract once made by the State, consistently with the integrity of constitutional guaranties, then there is no power in the State to override such grants and contracts, and thereby indirectly, but effectually, abrogate such guaranties.

XV.

The police power concerns itself only with the manner of using property with a view to the safety, health, morals and good order of society. It does not concern itself with values of property, or the value of its use.

XVI.

The tendency of the advocates of this class of legislation, here complained of, is to the subversion of all private rights, which it is the purpose of constitutions, both State and federal, to protect. This tendency, illustrated by conspicuous examples, with suggestions and authorities in opposition thereto.

XVII.

The opinion of the Illinois Supreme court in this case considered and criticised.

XVIII.

The legislation complained of, is in contravention of the 1st section of the 14th amendment to the Constitution of the United States.

Pomroy's Municipal Law, Sec. 638.
Pomroy's Municipal Law, Secs. 633 and 669.
Sedg. on Stat. and Const. Law, 16.

XIX.

The English parliament legislates under no *constitutional* restraints in the American sense of the word "constitutional." The acts of the English parliament are not necessarily precedents in this country when questions of constitutional law are involved.

Sedgwick on Stat. and Const. Law, 16.
Pomroy on Municipal Law, Sec. 683.

XX.

The formulas of the old law upon the subject of common carriers are not applicable to railroad transportation in this country.

ARGUMENT.

I.

A glance at the history of the legislation of the State of Illinois, and the experience of the State, as such, upon the subject of internal improvements, may throw some light upon the questions involved in this case.

It is not claimed, that this history should be conclusive, as against any well founded *principle* of law; but it may and fairly does show, that the theory upon which railroad charters were granted prior to the year 1851, and even up to the adoption of the constitution of 1870, was not, that railroads were monopolies to be regulated and controlled by the State, when no such right of regulation was reserved, but rather that they were private enterprises, *incidentally* beneficial to the public, the corporations themselves, created by the State, being responsible parties, capable of taking and exercising certain privileges and powers, and of contracting and being contracted with, *in their discretion*, for the purpose of carrying into effect the objects named in their respective charters. Especially was this true, as to the right and power of the corporations, either by themselves as corporate bodies, or through their boards of directors, or managers, to fix and establish rates of fare or toll, for the transportation of persons and property upon and over their respective lines of road.

The court will find printed herewith, as an *Appendix*, the sections of numerous railroad charters, relating to this subject, enacted by the legislature of Illinois, from the year 1835 up to the year 1851, when the charter of the

Illinois Central Railroad Company was passed, as a public law. In many of these charters, the absolute right to fix and determine the rates of fare or toll to be charged, was given to the several corporations, without limitation or restriction of any kind, *the charters themselves being perpetual.* In others of them, provision was made, that, in the event the dividends earned, exceeded a certain percentage for a specified period, *then* the State might interfere to regulate the rates of toll or fare, so that, for the next succeeding definite period, the net earnings for purposes of dividends, should not exceed the percentage named. These exceptional reservations clearly indicate the judgment and understanding of the State authorities, that the grant of power to fix and determine the rates of toll, conferred an absolute power for that purpose, in the absence of State control expressly reserved. They indicate, also, the inducements held out by the State, through its representatives, for the investment of private capital in that class of works within the State, usually denominated "Internal improvements." In 1835 the State was largely unbroken forest and prairie, far removed from markets, and almost beyond the boundaries of civilization. The products of its soil, except so far as required for home consumption, were scarcely worth the harvesting, and penury was the supreme condition of its citizens. Hence the offers liberally made to capital without the State, in some cases accepted and acted upon, in order to meet an apparent public necessity. The court will not fail to observe, in reading the charters referred to, that legislative control over the rates of fare or toll, was not relied upon by the State for obtaining *reasonable* rates for the transportation of persons and property over the lines of railroads, authorized to be constructed, and, if the

history of private charters for railroad purposes in Illinois, should be followed down to the adoption of the constitution of 1870, it would still more strongly appear, that the reliance of the State, in this respect, was solely and entirely grounded upon business principles, such as control in all other matters of private concern, and not upon any inherent and inalienable power in the State to interfere directly with the compensation, which should be charged, *unless such power was explicitly reserved.* Railroads were authorized, running in all directions and with such proximity and other physical relations to each other, that competition between them in the business of transportation, was inevitable. The theory of the State in this regard, did not disappoint it; for the competition thus established, has done more, and will continue to do more, in the reduction of tariff rates, than all the railroad commissions that ever have been, or ever can be established, since all such commissions, when acting honestly, act under rigid rules, which no business can be controlled by and succeed. In the State of Illinois, there are, at the present time, more than 10,000 miles of railroad. If the court will take the trouble to look at a map of the State, showing the lines of railroad, it will certainly be advised of the sufficiency of the competitive feature of railroad business, to accomplish all that the State, in the begining of its railroad legislation. anticipated from it.

In addition to the special charters referred to, the legislature of Illinois, in 1849, passed a general law for the incorporation of railroad companies. (See Revised Statutes of 1858, page 937.) The twenty-first section defines the powers granted to corporations organized under it. Of that section, division 10 is as follows: "To "regulate the time and manner in which passengers and

"property shall be transported *and the tolls and compen-*
"*sation to be paid therefor;* but such compensation for
"any passengeer and his ordinary baggage shall not ex-
"ceed three cents a mile, unless by special act of the
"legislature, and shall be subject to alteration *as herein-*
"*after* provided."

Section 32 contains the provision for alteration of tolls, etc., and reads as follows: "The legislature may, when "any railroad shall be opened for use, from time to time, "alter or reduce the rates of toll, fare, freight or other "profits upon such road; but the same shall not, without "the consent of the corporation, be so reduced as to pro-"duce with said profits *less than fifteen per cent. per an-*"*num* on the capital actually paid in, nor, unless, on an "examination of the amounts received and expended, to "be made by the secretary of state, he shall ascertain, "that the net income, derived by the company from all "sources for the year, then last past, shall have exceeded "an annual income of *fifteen* per cent. upon the capital of "the corporation actually paid in."

Notwithstanding the liberal provisions of this general law, I am not aware, that it was ever acted upon for the organization of a single railroad company. Certainly it was not, in respect to any of the principal lines of railroad within the State. The limited right of regulation, reserved to the legislature, was evidently viewed with distrust, and the granting of special charters was continued, from which this obnoxious feature was wholly omitted, although it is probably true, that no railroad company, organized and doing business within the State, has ever approximated, as an average, annual dividends of *fifteen* per cent. upon capital stock actually paid in. Thus early in the history of railroads in Illinois, did private capital neg-

atively express its unwillingness to become subject to legislative dictation in respect to its management and income, and the State authorities, heeding the suggestion, passed special laws, under which the railroads of the State have been mainly built, from which the objectionable features of the general law, were almost uniformly eliminated.

It may be fairly inferred from this brief statement of the history of railroad legislation, in Illinois, that it was the purpose of the legislature to confer upon railroad companies, organized under special charters, and certainly, in all cases, when the charters so explicitly provide, the power and the right to fix and determine the rates of toll and fare to be charged and received for the transportation of persons and property upon their respective lines of road. And it is unquestionably true, that these charters were accepted and acted upon, with the full understanding that such power and right was granted by them to the corporators, unless a reservation was expressly made. I should not go beyond the limits of professional propriety, if I should add, that this was the public expectation, and the law of the State, as expounded through its courts, when these special charters were passed, and down to the adoption of the constitution of 1870.

The State of Illinois, as it would seem, was not content with the progress made by it in matters of *internal improvements*, through the investment of private capital, notwithstanding the liberal overtures presented. The court will notice, that a large number of *special* charters for railroad purposes, were passed in 1835 and 1836. Impatient, apparently, of delay, or, possibly distrustful of the sufficiency of the inducements held out to private enterprise, the legislature in 1837, passed an act committing the State to a system of internal improvements

by the construction of railways, &c., on the credit of the State. The State proposed to be the owner of its transportation facilities. The act appropriated for the purpose, *preliminarily*, $8,000,000, to be raised by an issue of State bonds or obligations, and designated various routes upon which the money should be expended. The provisions of the act, pertinent here, were as follows:

The act referred to is entitled "An Act to establish and "maintain a general system of internal improvements," and may be found at page 121 of the Session Laws of 1837. It provided for the election by the legislature of fund commissioners to contract for and negotiate all loans authorized to be effected by the legislature on the faith and credit of the State, for objects of internal improvement, and "for the purpose of promoting and main-"taining a general system of internal improvements in the "State, and uniting its various branches under the same "supervision and direction" (excepting the Illinois and Michigan canal). It provided (Sec. 4) that "There shall "be created a board of public works, to consist of seven "members," who were authorized (Sec. 7) "to locate, su-"perintend, direct and construct on the part and behalf of "the State, all works of internal improvements, which "have been or shall be authorized to be undertaken, "prosecuted and executed by the State, either in whole "or in part" (except the Illinois and Michigan Canal.)

Section 18 appropriated $100,000 for the improvement of the navigation of the Great Wabash river; *also*, $100,000 for the improvement of the Illinois river; $100,000 for Rock river; $50,000 for the Kaskaskia river; $50,000 for the Little Wabash river; and provided that $250,000 of the first loans to be effected under the act, should be expended on the Great Western Mail route from Vincennes

to St. Louis. $3,500,000 was appropriated for the construction of a railroad from Cairo to some point at or near the southern terminus of the Illinois and Michigan canal, via Vandalia, Shelbyville, Decatur and Bloomington, and thence via Savannah, to Galena.* $1,600,000 was appropriated for a railroad from Alton to Shawneetown, called the Southern Cross Railroad; also, $1,800,000 for the Northern Cross Railroad from Quincy to the Indiana State line; $650,000 for a branch of the Central railroad to commence near where a direct line from Hillsboro to Shelbyville, would intersect the same, and thence to the Indiana State line; $700,000 for a railroad from Peoria to Warsaw; $600,000 for a railroad from Lower Alton to the Central railroad; $150,000 for a railroad from Belleville to intersect the railroad from Alton to Mt. Carmel; and $350,000 for a railroad from Bloomington to Mackinaw, in Tazewell county.

By section 20, it was provided, that for the purpose of constructing the several works contemplated, a fund for internal improvements should be constituted, to consist of all moneys, which should be raised by the sale of stocks or State bonds, or by loans authorized by law.

By section 21, the fund commissioners were authorized to borrow, from time to time, on the credit of the State, not exceeding $8,000,000, to meet the cost of the improvements authorized, for which loans, "certificates of "Illinois Internal Improvement stock," were to be issued in the name of the State. Various other provisions relating to the use and management of the improvements, are contained in the act, which are not here material.

It may not be doubted, that the entire appropriation

*This, in general outline, is the route of the Illinois Central railroad.

was speedily exhausted, and the financial condition of the State, incident to the inauguration of this "State policy," on the subject of internal improvements, is stated as follows, in the message of Governor Carlin to the legislature, in 1841 (Senate Journal of 1840–1, p. 10):

"Unless our internal improvement stock should rise "above its present selling price in the eastern cities, no "alternative has been presented to my mind to meet the "exigency, but the hypothecation or sale of State bonds "*below par*, which cannot be done under existing laws, "*but which would be preferable* to the loss of honor or "the prostration of the character and credit of the State."

This message shows the debt of the State, then existing, and mainly owing to the crazy notion, that the State had, or could have, business capacity and honesty, to have been upwards of $13,000,000; and all the State had to show for this large outlay, was a few unfinished embankments, incomplete surveys and gradings, but not one inch of finished improvement, of which the public could profitably avail itself.

In the meantime, the State was also engaged in the construction of the "Illinois and Michigan canal," and as aid to this, had received liberal donations of land from the national government. A few years later, that important enterprise became a *signal failure* in the hands of the State, and was, by the legislature, turned over to a committee of its creditors, called "canal commissioners," through whose management it was ultimately completed.

The constitution of 1818 permitted the legislature of Illinois to experiment with such enterprises of internal improvement. It was, in this respect, without limitation or restriction. Under the practical working of so broad a

power, the State, by legislation, constitutional in all its features, became committed to the policy of constructing railroads and canals, as highways for commerce and trade, within its limits, upon the faith and credit of the State—a *policy* which, within less than ten years from its inauguration, had reduced the State to *bankruptcy*, and the representatives of its credit, to merely nominal values. This is matter of State history, and cannot be denied. The experiment of Illinois was amongst the first in this country (although since often repeated,) which taught the lesson, by the *bitterness* of results, that the political power *is utterly unsuited to the proper and economical administration of business enterprises*, and the people of the country now understand, that no public improvement of any kind, can be undertaken under the direction of political agencies —that no county court house, State capitol, post-office, or custom house, can be constructed, *which does not in expense, dupilcate the necessary cost*, and give rise to legislative or judicial investigations upon charges of *conspiracy or corruption in office*, sickening in their details, and unprofitable in their results. The country is disgusted with committees of investigation, as well as *judicial trials*, in all such matters, and *sober judgment* and sound *common sense*, have been compelled to the conclusion, that the elements of *fair, honest and economical* business management, do not reside in the legislative power, either of the State, or of the nation at large; and history says—*this conclusion is right.*

Fortunately for themselves, the people of the State of Illinois heeded the teachings of their first lesson in this respect; and, whilst it may not be said, that the constitution of 1848 deprived the legislature of the *power* to engage in works of internal improvement, the conditions

were such, that those provisions and the experience of the past, operated as a practical prohibition, and started the State upon a new departure. The former "State policy" was certainly abandoned. Section 38 of article 3 provided that "the credit of the State shall not *in any man-* "*ner* be given to or in aid of any individual, association, "or corporation."

Section 6 of *article* 10, provided that "*the general assem-* "*bly shall encourage internal improvements by passing* "*liberal laws* of incorporation for that purpose."

The same instrument made provision, which has since proved amply sufficient, for the extinguishment of the State debt, resulting, inevitably, as it would seem, from the former theory of "State policy," which the constitution of 1818 permitted the legislature to experiment with.

The notable failure of the State to secure, through State interest and management, necessary public improvements, had, in Illinois, two results: 1st. The protection of the people against the consequences of embarking in expenditures for internal improvements, under the guidance and authority of the legislative power; and, 2d, the further encouragement of private enterprise to undertake those works of public improvement and development, which the State, as such, was *practically prohibited* from entering upon or being interested in. The logic of this statement can neither be denied, or controverted. The result of this new theory of "State policy" has vindicated the wisdom of its adoption. The cause and the effect are also matters of State history.

Shortly after the establishment of this new theory of "State policy," and on February 10, 1851, the charter of the Illinois Central Railroad Company was passed. Under this charter, which is a public law, and, on the face of it, pro-

vides that it shall be *liberally* construed, the company was organized, the money of its stockholders and bondholders, who have at all times been largely non-residents of the State, subscribed, contributed and invested, and having passed the period of struggle, incident to a new enterprise in a new country, and, by the fact of its existence, contributed largely to the development and progress of the State, the Illinois Central Railroad Company, at the age of more than thirty years, has settled down into an established fact, to be judged of by itself, and its interests are rightfully to be considered *first* with reference to itself and its stockholders, and *secondly*, with reference to the State and the people of the State, towards whom *it owes only such obligations as may result from its contracts understandingly entered into*, all of which, as it claims, have been carefully and conservatively performed. Neither the State, nor the people of the State, have any just ground of complaint against the Illinois Central Railroad Company. *The present case justifies this statement.*

After more than twenty years of development and growth under the constitution of 1848, the people of Illinoise wisely concluded, that they had outgrown some of its provisions. It had helped the State out of all its financial embarrassments; foreign capital, under liberal State laws, had sought and made permanent investments within its borders; the State credit had been re-established; its population, strength and influence increased more than ten fold, and the restrictions of constitutional law, made reasonable by the condition of penury and bankruptcy in 1848, became *pitiable* representations of *sovereign meanness* in a great and prosperous State, which, legislation was, in many instances, and possibly by unconstitutional methods, trying to remedy. But whilst the policy of the

State, in some of these particulars, was, to a considerable extent, revolutionized by the constitution of 1870, and a more generous legislation authorized in respect thereto, still the spirit of legislative enterprise, in the line of internal improvements, *through State agency*, was shorn of all its ambitious pretensions by section 20 of article 10, which provides that "The State shall never pay, assume "or become responsible for the debts or liabilities of, or "in any manner loan or extend its credit to or in aid of, "any public or other corporation, association or indi- "vidual." And the same popular prohibition and constitutional restraint upon legislative speculations, directly and pointedly, aimed at canals and railroads, is contained in the third (3d) of the "Separate Sections" of the constitution of 1870, which, so far as here applicable, is as follows: "The General Assembly shall never loan the credit "of the State, or make appropriations from the treasury "thereof, in aid of railroads or canals: *provided*, that any "surplus earnings *of any canal* may be appropriated for "its enlargement or extension."

In this connection, I wish to call attention (but for use hereafter), to two provisions of this fundamental document, *which are not repealable by legislation;* the *first* of which is section 23, of Article IV, and reads as follows: "Sec. 23. The General Assembly shall have no power "to release or extinguish, in whole or in part, the indebt- "edness, liability or obligation of any corporation or indi- "vidual to this State, or to any municipal corporation "therein."

The second provision is the *first* clause under the heading of "*Separate Sections.*" It relates exclusively to the ILLINOIS CENTRAL RAILROAD COMPANY, and is as follows (the italics being my own):

"*No contract, obligation or liability whatever* of the Illi-
"nois Central Railroad Company, to pay any money into
"the State treasury, nor any lien of the State upon, or
"right to tax property of said company, *in accordance*
"*with the provisions of the charter of said company*, ap-
"proved February 10th, in the year of our Lord, 1851,
"*shall ever be released, suspended, modified, altered, re-*
"*mitted or in any manner diminished or impaired, by legis-*
"*lative or other authority*; and all moneys derived from
"said company, after the payment of the State debt, shall
"be appropriated and set apart for the payment of the
"ordinary expenses of the State government, and for no
"other purposes whatever."

The court will not fail to observe, that the framers of the constitution and the people of the State, in adopting it, by the clause last quoted, emphatically recognized the charter of the Illinois Central Company as *a contract* between the State and the company, or at least as containing provisions entailing *obligations and liabilities*, for which the charter, as a contract between the company and the State, must furnish the foundation. I call especial attention to this in deference to, but *not out of respect for*, a certain *insidious* minority sentiment, rather *political* than judicial in its character, which has occasionally cropped out in dissenting opinions of judges, that charters of corporations should not be considered as contracts within the meaning of the constitution of the United States. That the settled doctrine of the courts of the country, is against this sentiment, even in the absence of such special constitutional ratification of it, as is here presented, there can be no doubt, and, hence, it is unnecessary to discuss the question as a general and open one.

In view of these preliminary facts and suggestions,

this argument ought, perhaps, to conclude by a mere recital of the provisions of the charter of the Illinois Central Railroad Company, the acts of legislation of Illinois, claimed to be in conflict therewith, and the decision of the Supreme court of the State of Illinois upon this case, to which exceptions are here taken. Further discussion may be wearisome to the court, but seems, nevertheless, admissible.

So much of the charter of the Illinois Central Railroad Company as is material in this case, is as follows:

"SEC. 5. All the corporate powers of said company "shall be vested in and exercised by a board of directors, "and such officers and agents as they shall appoint. The "board of directors shall consist of not less than twelve "stockholders, three of whom shall be chosen every year "by the stockholders, each share of stock having one "vote, to be given in person or by proxy; and the gov- "ernor of the State of Illinois, who shall be a director *ex* "*officio*, perpetually, voting in person or by proxy; each "director successively elected to continue in office until "his successor is elected and qualified. Vacancies in the "board may be filled by a vote of two-thirds of the di- "rectors remaining," &c.

"SEC. 7. The president and directors for the time "being, are hereby authorized and empowered, by them- "selves, their officers and agents, to execute all the "powers herein granted for the purpose of surveying, "locating, constructing, completing, altering, maintaining, "and operating said road and branches, and for the trans- "portation upon the same of persons, goods, wares and "merchandise, with all such powers and authority of con- "trol and management of the affairs of said company, as

"may be necessary and proper to carry into full and "complete effect the meaning and intent of this act."

"Sec. 8. The said company shall have power to make, "ordain and establish all such by-laws, rules and regula- "tions as may be deemed expedient and necessary to fulfill "the purposes and carry into effect the provisions of this "act, and for the well ordering, regulating and securing "the affairs, business and interests of the company; *pro-* "*vided*, that the same be not repugnant to the consti- "tution and laws of the United States and of this State, "or repugnant to this act. *The board of directors shall* "*have power to establish such rates of toll for the convey-* "*ance of persons and property* upon the same, as they shall "from time to time by their by-laws direct and deter- "mine, and to levy and collect same for the use of the "said company. The transportation of persons and prop- "erty, the width of track, the construction of wheels, the "form and size of cars, the weight of loads, *and all* "*other matters and things respecting the use of said road* "*and the conveyance of passengers and property*, shall be in "conformity to such *rules and regulations as said board of* "*directors* shall from time to time determine." * * *

Sec. 15. By this section, which is very lengthy (too much so for literal transcription here), the State granted to the company all the lands in the State of Illinois, given by the United States to the State of Illinois by an act of congress passed September 20, 1850, entitled "An "act granting the right of way and making a grant of "land to the States of Illinois, Mississippi and Alabama, in "aid of the construction of a railroad from Chicago to "Mobile," together with certain other rights of way, grounds, grading, &c., then belonging to the State, "for the "only and sole purpose of surveying, locating, construct-

"ing, completing, altering, maintaining and operating said "road and branches, as in this act provided." Then follow various provisions relating to the manner in which the title to said land should be held, their sale and disposition, and the use to be made of their proceeds, none of which are important for any purpose, connected with this case.

"SEC. 18. In consideration of the grants, privileges "and franchises herein conferred upon said company for "the purposes aforesaid, the said company shall, on the "first Mondays of December and June in each year, pay "into the treasury of the State of Illinois, five per centum "on the gross or total proceeds, receipts or incomes de- "rived from said road and branches, for the six months "then next preceding. The first payment of such per- "centage on the main trunk of said road, to commence "four years from the date of said deed of trust, and on "the branches, six years from the date aforesaid, unless "said road and branches are sooner completed, then from "the date of completion." Then follows a provision for ascertaining the gross income upon which the percentage shall be paid.

The twenty-second section provides that the lands selected under the act of congress and conveyed to the company "shall be exempt from all taxation under the "laws of this State, until sold and conveyed by said cor- "poration or trustees, and the other stock, property and "effects of said company shall be in like manner exempt "from taxation for the term of six years from the pass- "age of this act." After that, it is provided that the property of the company shall be listed by the proper officer of the company, and *an annual tax for State purposes shall be assessed by the auditor* thereon, and that

"whenever the taxes levied for State purposes shall ex-
"ceed three-fourths of one per centum per annum, such
"excess shall be deducted from the gross proceeds or in-
"come herein required to be paid by said corporation to
"the State; *and the said corporation is hereby exempted*
"*from all taxation of every kind except as herein provided*
"*for.* * * * * * * *Provided*, in case the five per
"cent. provided to be paid into the State treasury and the
"State taxes to be paid by the corporation, do not amount
"to seven per cent. of the gross or total proceeds, re-
"ceipts or income, then the said company shall pay into
"the State treasury the difference, so as to make the
"whole amount paid equal at least to seven per cent. of
"the gross receipts of said corporation."

The Illinois legislation, supposed to be in force when the alleged cause of action in this case arose, and upon which, connected with other facts to be presently stated, this action was based, began after the adoption of the constitution of 1870, and by an act approved April 7, 1871, entitled "An act to prevent unjust discriminations and ex-
"tortions in the rates to be charged by the different rail-
"roads in this State for the transportation of freights on
"said roads." This act was one of a series of acts passed at the same session of the legislature, relating to railroads and warehouses; one of which created a board of railroad and warehouse commissioners, and purported to confer upon said board, authority to fix maximum rates of charges for the storage of grain in warehouses and the transportation of freight and passengers upon railroads in the State. The act, the title of which is above given, was repealed and its provisions modified and enlarged, and, as modified and enlarged, re-enacted by an act passed in 1873, approved May 2, 1873, entitled "An act to prevent extor-

"tion and unjust discrimination in the rates charged for "the transportation of passengers and freights on rail- "roads in this State, and to punish the same, and prescribe "a mode of procedure and rules of evidence in relation "thereto, and to repeal an act entitled 'An act to prevent "unjust discriminations and extortions in the rates to be "charged by the different railroads in this State for the "transportation of freights on said roads,' approved April "7, 1871."

This latter act was in force, if in force at all, when the alleged cause of action in this case arose, and as amended in 1874 (which amendments are here immaterial), is contained in sections 110 to 119, both inclusive, of chapter 114, entitled "Railroads" and "Warehouses," of the recent compilations and revisions of the statutes of Illinois. The title, chapter and sections are the same in the latest editions, both of Hurd and Cothran.

Section 110 provides that "If any railroad corporation "organized, &c., shall charge, collect, demand or receive "more than a fair and reasonable rate of toll or compensa- "tion for the transportation of passengers or freight of "any description, * * * * the same shall be deemed "guilty of extortion, and, upon conviction thereof, shall be "dealt with as hereinafter provided."

Section 113 provides that "Any railroad corporation "guilty of extortion * * * shall, upon conviction "thereof, be fined in any sum not less than one thousand "dollars ($1,000) nor more than five thousand dollars "($5,000), for the first offense." The penalties are then increased as follows: for the second offense to not less than $5,000 nor more than $10,000; for the third offense to not less than $10,000 nor more than $20,000, and for

every subsequent offense to $25,000, "*Provided*, that in "all cases under this act, either party shall have the right "of trial by jury."

Section 114 says: "The fines hereinbefore provided for "may be recovered in an action of debt, in the name of "the people of the State of Illinois, and there may be sev- "eral counts joined in the same declaration, as to extortion "and unjust discrimination, &c.; *provided*, that in all cases "under the provisions of this act, *a preponderance* of evi- "dence in favor of the people shall be sufficient to author- "ize a verdict and judgment for the people."

Section 117 provides as follows: "The railroad and "warehouse commissioners are hereby directed to make, "for each railroad corporation doing business in this State, "as soon as practicable, a schedule of reasonable maximum "rates of charges for the transportation of passengers and "freights and cars on each of said railroads; and said "schedules shall, in all suits brought against any such "railroad corporations, wherein is in any way involved the "charges of any such railroad corporations for the trans- "portation of any passenger, or freight, or cars, * * * "be deemed and taken, in all courts of this State, as *prima* "*facie* evidence, that the rates therein fixed are reasonable "maximum rates of charges for the transportation of pas- "sengers and freights and cars upon the railroads for "which such schedules may have been respectively pre- "pared. Said commissioners shall, from time to time, and "as often as circumstances may require, change and revise "said schedules." The section then provides for the pub- lication of the schedules, and makes the schedules "pur- "porting to be printed and published as aforesaid," re- ceivable in all suits under the act, as *prima facie* the schedules of said commissioners, "without further proof

"than the production of the schedules desired to be used
'as evidence, with a certificate of the railroad and ware-
"house commissioners that the same is a true copy," &c.

The present action was brought in the Circuit court of Douglas county, Illinois, by The people, &c., against the Illinois Central Railroad Company, and, by the declaration in the case, the railroad company is charged, in as many separate counts, with thirty or more violations of the law last above referred to. The 17th count (the only one to be considered) alleges that the company charged and received twenty-eight dollars and thirty-five cents ($28.35) for transporting seventy (70) barrels of salt, weighing ten tons, from Chicago to Tuscola, in said Douglas county (a distance of about 150 miles), which amount, so charged and received, was in excess of reasonable rates. The hearing, in the Circuit court of Douglas county, was had upon the single count above named, and an agreed statement of the facts, which, in substance, is that the Illinois Central Railroad Company, by direction and authority of a by-law of its board of directors, did charge and receive twenty-eight dollars and thirty-five cents for transporting the seventy barrels of salt from Chicago to Tuscola, which would be at the rate of forty and one-half cents per barrel, and that the schedule of the railroad and warehouse commissioners in force at that time (if in force at all) fixed the maximum charge for the same transportation service, at the sum of twenty-four dollars and eighty cents, or thirty-five and three-sevenths cents per barrel. The difference is three dollars and fifty-five cents on the whole seventy barrels, probably constituting a car-load, or five and one-fourteenth cents on each barrel.

This is the entire case. It may be said, perhaps, that the circumstances, as I have detailed them, indicate that

technicalities were waived, for the purpose of making a *test* case. Whether so or not, is immaterial. Upon such a record, the Circuit court of Douglas county found the issues in favor of the original plaintiff, "The people, etc.," and assessed the damages (which was a fine or penalty under the statute) at the sum of $1,000, and judgment for that sum and costs was duly entered of record against the railroad company. From that judgment the railroad company appealed to the Supreme court of Illinois, where, after a delay of several years, the judgment below, in an opinion, to which attention will be hereafter directed, was affirmed. The same record, including the opinion of the Supreme court of Illinois, is now before this court, upon a writ of error, and the questions to be here decided are, of course, purely constitutional ones.

If, in the foregoing statement of the history, constitution and laws of the State of Illinois, and of the facts of the pending cause, I have omitted anything, material to be considered in the decision of the case itself, the omission is accidental, and will be supplied by the statements of counsel for the defendant in error. If, however, it should be suggested that there are other provisions of the Illinois constitution of 1870, apparently mandatory in their character, in respect to legislation of the class referred to, the answer to such suggestion would be, that such mandate cannot add to the force or validity of any act passed by the State legislature, for the following reasons: 1st. The General Assembly of Illinois has all the legislative authority of the people of the State, except as it is limited and abridged by the constitution, and a mere constitutional direction or recommendation can, therefore, add nothing to the binding effect of a State enactment. 2d. In its relations to the constitution of the United

States, the provision of a State constitution, is of no higher authority than an act of a State legislature. They are both merely State enactments, when required to be tested, as to their validity, by the provisions of the Federal constitution—and, in the pending case, no questions can be controlling, in this court, except by virtue of their relations to the provisions of that fundamental law.

The main question, and the one around which all others must arrange themselves, chiefly as incidents, illustrations or arguments, is as to the validity of that part of the legislation of the State of Illinois above referred to, which attempts to confer upon the railroad and warehouse commissioners power to fix maximum rates of toll for the taansportation of passengers and freight, and the action of the commissioners thereunder, *in their relation to the Illinois Central Railroad Company*. This litigation is personal and direct. It concerns no one except the State on the one side and the particular railroad company on the other. What the rights of the State, or of the people of the State, may be in other cases, presenting different facts and other conditions, it is not here important to consider. The Illinois Central Railroad Company presents to this court, its own case, which, in so far as it can be distinguished, is not bound by rules established, or precedents made; and whilst it may be necessary, perhaps, to consider other cases, still it will be found, at the last, that the controlling elements of the present case, have been only indirectly involved, and that it may be and *should be broadly distinguished* from any case, which has preceded it, upon or relating to the much mooted question of the power of State legislation over the charter rights of corporations.

II.

The right and power of corporations to make by-laws, rules and regulations respecting their own business, does not depend upon legislative grant. It inheres in the corporations themselves. If the first part of the 8th section of the charter of the Illinois Central Railroad Company, including the PROVISO, *were left out, the authority of the company, to make "by-laws, rules and regulations," would neither be enlarged nor diminished.*

"The great function of by-laws is to regulate, control "and manage the affairs of the corporation. They cre- "ate a kind of contract between the members on the one "part, and the corporation on the other, *generally directed* "*to the conduct, and to define the duties of the officers and* "*members of the corporation between themselves.* They "are not intended to interfere with the rights and privi- "leges of third parties or strangers, nor could they be "made binding upon them."

Potter on Corporations, Sec. 76, p. 119.

The power or right of a corporation to make by-laws pertaining to the general management of its business does not depend upon any specific grant of authority to make by-laws. It is a power incident to the corporation itself.

Angell & Ames on Corp., Sec. 325 *et seq.*

Potter on Corporations, Secs. 70–1, p. 114–5.

The *proviso* in the 8th section of the Illinois Central Railroad Company's charter is simply a limitation on what precedes it in the same section.

Potter's Dwarris on Statutes, &c., 118.

The *proviso* is simply a statement of what the law would decide; it adds nothing to and takes nothing from the power of the corporation over the subject matter.

All *by-laws* must be consistent with the purposes of the corporation; relate to the management of its business; must be reasonable in their provisions, and not in conflict with existing laws of the State.

It is evident from the suggestions and the authorities referred to, that the first part of the 8th section of the charter of the Illinois Central Railroad Company, including the *proviso*, added nothing to and took nothing from the power of the corporation to make by-laws; and it must be obvious that the word *by-law*, as used in the latter part of the same section and in connection with the authority, *directly* conferred upon the board of directors to fix and determine, *from time to time*, the rates of toll and fare for the transportation of persons and property over the company's lines of road, must have a different and specific meaning.

The governor of the State is, by the charter, made a member of the board of directors, *perpetually*, and, doubtless, for the purpose of protecting the rights and interests of the public, and it is upon the board of directors, which includes the governor of the State, that *the power to fix rates is conferred by the charter*, and upon the board of directors, *as distinguished from the corporation itself*. The board of directors, as constituted, was, by the charter, made the arbitrator, in this respect, between the company on the one side and its patrons or the public on the other.

This was the convention between the State and the company, and it is without limitation or qualification. There was, undoubtedly, a further object in conferring this power upon the *board of directors*. From the very

nature of the case, the rates of toll or fare would be subject to fluctuations, dependent upon business and competition. The board of directors was a comparatively small body. It was charged by the charter with the administration of the business of the company. It would, naturally and necessarily, be better advised of the details of the corporate business, than the great body of the stockholders, and could act more efficiently and promptly when a change of conditions required a change in tariff rates. It would seem, therefore, to be reasonably certain that the word *by-law*, as used in the latter part of section 8 of the charter, should not have the same meaning as when used in the previous part of the same section, but should be held simply to signify the action of the board of directors, expressed in any appropriate form, in execution of the power conferred upon them to fix and determine the rates of toll or fare. Effect should be given, if possible, to every part of a law, and in the way indicated, the two parts of the section are made consistent and effective, and the intentions of the parties carried out, according to their expectations, and the proper signification of the language employed by them. I understand that grants by the State, are to be strictly construed, and that nothing passes by implication; but it is equally true, that what is *explicitly* granted, shall not be taken away by implication or casuistry. And in this case, "the power to establish" the rates of toll and fare is *specifically* granted, without limitation or restriction.

III.

The State legislation, here complained of, is an attempt on the part of the State to impair the obligation of a contract, and, in its application to the Illinois Central Railroad Company, is in violation of the first clause of Section 10 of Article 1 of the Constitution of the United States.

In view of what has already transpired, there are many considerations of public as well as private interest, clustering around this proposition, all of which have an appropriate bearing upon it, and to omit them would be to neglect the case, as it now stands, upon its individual facts, and as related to former judicial decisions. The old proposition, worn out and threadbare with repeated hammerings, is, of course, included as the first, and, for the purposes of this case, and making it no broader than the case itself requires, I state it, as follows:

The *charter* of a *private* corporation is, *or at least may be*, a *contract* between the State and the corporators *within the protection of the clause of the constitution of the United States referred to.*

In putting the proposition in this way, I am simply limiting a broader proposition, which I believe to be sound, to the requirements of this individual case. It may be, that in the almost endless variety of provisions, introduced into private charters, some of them may properly be construed as merely legislative licenses, subject, in every respect, to legislative control. If there are any such, I am not dealing with an example of them now. The charter of the Illinois Central Railroad Company *is a contract between the State and the company without constitutional protection;* otherwise, the courts of the country, in-

cluding the Supreme court of Illinois, have been in error for half a century. It is unnecessary to refer to the decisions of this court, or of the courts of other States than Illinois. The Supreme court of Illinois, representing the judicial judgment of the State, which is one of the parties to the contract, has settled this question, and that settlement is not open to review by this court, in this case. This, as between private parties, would amount to an estoppel. The State may possibly have more latitude, if its counsel choose to experiment with it.

In the case of the *Illinois Central R. R. Co.* v. *The County of McLean*, 17 Ill., Repts., 291, the question presented being as to the exemption of the property of the company from general taxation, the feature of the charter of the company *as a contract*, was directly involved, and the court, after stating the extent of the investigation and consideration given to the subject, at page 292, says: "And we feel authorized and required, as we believe, "from that consideration, to sustain the provisions of the "twenty-second section of the act incorporating the "plaintiffs; and that the payments provided for in the "eighteenth section of their charter, have been constitu-"tionally substituted under the second section of the con-"stitution, in lieu of the general rule of uniformity and "proportion fixed in its first clause."

It may be proper to remark, that such a substitution, valid and effectual, could not rest upon legislation, merely as such, and that the decision of the court can stand only upon the basis of a valid and subsisting contract between the State and the company.

In the case of *Newstadt et al.* v. *Illinois Central R. R. Company*, 31 Ills. Repts., 484, the same question was again presented, and the court, in a unanimous opinion,

decided that the charter of the company was a contract between the company and the State. The opinion, after referring to the charter, and especially to the 22d section, proceeds as follows (page 485):

"*The act to incorporate the Illinois Central Railroad* "*Company*, of which the above section is part, *is a con-* "*tract between the State and the Company, which cannot* "*be changed or amended without* the consent of both con- "tracting parties.

"In consideration of the undertaking of the company "to construct a great thoroughfare, which should involve "the expenditure of millions, and which was an experi- "ment, and seven per cent. of the gross amount of its "receipts or income to be paid to the State, the com- "pany was released from the payment of all other than "State taxes, to be assessed as provided in this section. "The language is plain and explicit: 'the corporation is "'hereby exempted from all taxation of every kind ex- "'cept as herein provided for.' *This being the contract* "*between the State and the corporation*, no city or town "can impose a tax for municipal purposes on the prop- "erty of that company, which may be within their limits. "*Illinois Central Railroad Company* v. *The County of* "*McLean*, 17 Ill., 291."

Both of these cases were considered and decided long before the adoption of the constitution of 1870, the latter in the year 1863, and there is no decision of any reputable court, or, so far as I am advised, of any court of Illinois, at variance with the doctrine thus announced. I assume, therefore, *upon this foundation*, that the *judicial* department of the State of Illinois, is committed to the proposition, that the charter of the Illinois Central Railroad Company, is a *contract between the State and the*

company, not only by inference, but by explicit declaration, in cases decided by it, in which the proposition was directly involved.

To the force of this, if a complement is needed, I present the special article of the constitution of 1870, relating to the Illinois Central Railroad, already quoted in my statement of the case, and which I must, for my present purpose, here repeat, so far as material, viz.:

"No contract, obligation, or liability whatever, of the "Illinois Central Railroad Company to pay any money "into the State treasury, nor any lien of the State upon or "right to tax, property of said company *in accordance* "*with the provisions of the charter of said company*, ap- "proved February 10, in the year of our Lord 1851, *shall* "*ever be released, suspended, modified, altered, remitted, or* "*in any manner diminished or impaired by legislative or* "*other authority*." * * *

If the forces of State legislation, variable as the winds though they may be, can be bound down, repressed, confined and rendered innoxious, by any imposition of constitutional prohibitions, covering the special subject, we have here an illustration of such repression. *And it is not for the judicial power to lessen the restraints thus placed over them.* Section 23 of Article IV. of the same constitution, already quoted, and which it is not necessary to repeat, is quite as effectual, but not so *specifically* applicable to the present case.

The people of Illinois, by their constitution, and after nearly twenty years of experience of the operations of the Illinois Central Railroad Company's charter, deliberately ratified it, as a contract between the company and the State, recognized the obligations and liabilities of the company thereunder to the State as still subsisting, and

prohibited any and all relief therefrom, or modification thereof. And now what has the legislature of Illinois, thus hampered and crippled in its authority, and shorn of every vestige of power over the subject matter, attempted to do? It has attempted to rehabilitate itself with all the powers, respecting the control and management of railroad property owned by private citizens under private charters, which it was adjudged incompetent by the constitutions of 1848 and 1870, to exercise in respect to similar property owned by the State. It has attempted to trifle with, hamper, and, in a certain sense, to confiscate private investments, which by favorable legislation, it promoted and encouraged. It has attempted to resume rights once solemnly granted away, without the ability to restore the consideration. It has attempted to do what the constitution of Illinois and the constitution of the United States, both say, it shall not do, viz.: destroy or amend a contract, deliberately made and as deliberately ratified and confirmed.

In addition to this, I may confidently refer to the case of *Illinois Central Railroad Company* v. *Goodwin*, 94 Ills. Repts., 262.

True, it was a case of taxation of lands claimed to be exempt from taxation, *under the provisions of the charter;* but this exemption is only *one* of the elements of the *contract* of the State with the company. The court say (p. 264):

"It has been repeatedly held that this charter forms a "contract between the State and the company. *Neustradt* "v. *Ill. C. R. R. Co.*, 31 Ills., 484; *Illinois Cent. Railroad* "*Co.* v. *Irwin*, 72 *id.*, 452. It is also held by those "cases, and by the case *Illinois Cent. Railroad Co.* v. "*McLean County*, 17 Ills., 291, that this section is consti-

"tutional and binding; and by a separate section of the "constitution of 1870 (Rev. Stat., 1874, p. 81), it is pro- "vided, that no contract, obligation or liability of this com- "pany to pay any money into the State treasury, nor any "lien of the State upon or right to tax property of the "company in accordance with the provisions of the char- "ter of the company, shall ever be released, suspended, "modified, altered, remitted, or in any manner diminished "or impaired, by legislative authority, etc. This, in the "most unequivocal and emphatic manner, *confirms and* "*prevents any* alteration or change in the charter and "amendments relating to the taxation of the property of "the company."

I will not quote further from the case; but it might have been well for the honorable court to have considered the contract feature of the Illinois Central Railroad Company's charter, as above stated, and its several and separate provisions, *as a contract*, before assenting to the judgment from which the present writ of error is taken. I submit the decision and opinion in that case, and will only ask that it be fairly contrasted with the judgment and opinion of the same court, shown in the present record.

Apart from the judicial construction, given to the charter of the Illinois Central Railroad Company, the language of the charter itself, *is the language of a contract*, and cannot be otherwise construed, except by doing violence to the plainest suggestions of reason and the settled rules of interpretation. The language to which I specially refer, is contained in the eighteenth section of the charter. I have already given it, but do so again in this connection:

"In consideration of the grants, privileges and fran- "chises herein conferred upon said company for the pur-

"poses aforesaid, the said company shall, on the first "Mondays of December and June in each year, pay into "the treasury of the State of Illinois five per centum" (by subsequent section 22 increased to seven per centum at least) "*on the gross or total proceeds, receipts or income* "derived from said road and branches for the six "months then next preceding. The first payment, &c. This charter was formally, and, according to its provisions, accepted by the corporators. Evidence of this is found in the record, and also, in form to be judicially recognized, in the constitution of 1870, and in the fact, that the company has been operating under this charter, in the State of Illinois, for more than thirty years, doing the work and performing the obligations thereby imposed upon it; and it cannot be doubted, or reasonably questioned, that the language, quoted from the charter, coupled with an acceptance of the charter by the corporation, was intended to constitute a valid and binding contract, and that the language is appropriate for that purpose.

That some rights were, by the charter, conferred upon the railroad company, probably, will not be controverted. I will state some of them, which seem to be conspicuously prominent, without, for the present at least, attempting to point out which of them should be classed as *grants*, which as *privileges*, or which as *franchises*. Such classification would seem to be immaterial:

First. *The right* to be and continue a corporation.

Second. *The right* to locate, construct, maintain and operate a railroad.

Third. *The right* (it is called in the charter "*the power*"), through its board of directors, selected and constituted in the manner indicated "*to establish such rates of*

"*toll for the conveyance of persons and property upon the "same*" (the railroad) "*as they*" (the directors) "*shall "from time to time, by their by-laws, direct and determine, "and to levy and collect the same for the use of the said "company.*"

Fourth. *The right*, through its board of directors, to determine all "matters and things respecting the use of "said road and the conveyance of passengers and prop- "erty" thereon.

Fifth. *The right* to certain lands and the proceeds thereof, to be used in the construction, equipment and maintenance of its railroad.

Sixth. *The right* to be exempt from general State taxation.

And the charter says, in so many words, that "*In con- "sideration of*" these rights, ("*grants, privileges and franchises*") conferred upon the company by its charter, the company shall pay, etc., and the company, for the same consideration, accepts the charter and thereby assumes and becomes bound to perform, the obligations which the charter imposes, and from which the constitution of Illinois says, *the legislature shall have no power to release it.* Could language be plainer in its meaning and effect? Is there anything like ambiguity, or approximating uncertainty? Would any lawyer pretend to assert, that, if the case were between individuals, a bill in equity would lie to set aside the convention for fraud or mistake?

The *power* of the Illinois Central Railroad Company to enter into and bind itself to the performance of, this treaty, will not be questioned, and I will not prejudge the intelligence of the learned attorney general of the State of

Illinois, or his associates in this case, if any, by assuming that any argument, or statement even, will be made against the power of the State, represented by its legislative department, to make the contract as it was made. The contract, and the authority of the parties to make it, cannot be denied. The more important question is, *can the contract be evaded?* Is there an avenue left in the political machinery of the State, or, as it is sometimes put, is there a high functional prerogative of sovereignty, which enables the State, *constitutionally*, to violate its own fundamental law, and repudiate its contracts at pleasure? Something of this sort there must be, otherwise the State and its legislature are bound by and cannot evade this contract, deliberately entered into, and the benefits of which it insists upon enjoying.

I will not now discuss the possibilities of evasion; and for the present, assuming the contract character of the railroad company's charter to be established, so that the court will recognize it as such, I desire here and in connection with the "*grants, privileges and franchises* * * "conferred upon said company" by its charter, all of which, so far as enumerated, I have included under the head of *rights*, to call attention to something of the law, generally considered controlling in matters of contract. It is familiar to the court, at least to the full extent here necessary to apply it, and it would be the merest professional pedantry to attempt to establish it by a citation of authorities, for my present purpose.

The ancient doctrine of the law, the statement of which *in extenso*, is covered by the words *nudum pactum* is universally understood. The principles of the law applicable to a case of "*failure of consideration*" under a contract, are equally well established, recognized and

conceded. A good or valuable consideration, either actual, or conclusively presumable under the rules of law, is an essential element of a valid contract, which the courts will enforce. And it is equally a matter of principle in the law, that, if a contract is entered into, by which, for a consideration definitely stated and provided for by one party, the other party agrees to do certain acts or make certain payments, and the consideration *subsequently* fails, either in whole or in part, the latter party is by law released, either in whole or in part, from the performance of his agreement, according to the extent of the failure of consideration. The manifest justice of this principle, independent of its adoption as a rule of law, commends it to a rigid and impartial enforcement.

Applying this principle, or rule, to the case here presented, and conclusions, naturally and logically follow as inevitable. The language of the charter and the language of the constitution of 1870, applicable specifically to the Illinois Central Railroad Company, must be considered together in this connection.

The former is that "*in consideration of the grants, "privileges and franchises* herein conferred upon said com- "pany for the purposes aforesaid, said company shall, on "the first Mondays, &c., pay into the treasury of the "State," &c. The language of the latter is that, "no "*contract, obligation* or *liability* whatever, of the Illinois "Central Railroad Company to pay any money into the "State treasury * * * * in accordance with the "provisions of the charter of said company * * * * "*shall ever be released, suspended, modified, altered, remit-* "*ted, or in any manner diminished or impaired, by legisla-* "*lative or other authority.*"

Note the continually ascending force of the words here

made use of. The dictionary of the language was overhauled to find terms sufficiently expressive of the popular determination to hold the Illinois Central Railroad Company to the performance of every part of its contract, obligation or liability to the State, according to the provisions of its charter, and to take away from the legislature *and everybody else*, which must include the people of the State, so long as this constitution remained in force, *all power* to "*in any manner* diminish or impair the con- "tract, obligation or liability" of the company under that charter.

Now, no question of the comparative value of the several rights ("*grants, privileges and franchises*"), conferred upon the company by its charter, can here be made; but, if such a comparison were possible, I would venture the assertion, without fear of reasonable contradiction, that next after a right to be a corporation and to locate, construct, maintain and operate a railroad, would stand, *conspicuous in importance*, the right (or *power*), through its board of directors, to establish the rates of toll for the transportation of passengers and property over its railroad, and to levy and collect the same for the use of the company.

Indeed, in comparison with this right as a permanent and continuing one, unlimited in duration, as it is by the terms of the charter, the land grant, although valuable in itself, and exemption from general taxation under the laws of the State, are vastly insignificant; and without this right (or *power*) very little of *commercial* value at least, would attach to the preliminary organization as a corporntion, and the right to build a railroad. So important is this right with reference to private investment, that I venture the further statement, as a reasonable one,

which the court must recognize, that, if the Illinois Central Railroad Company's charter had contained a provision, that the general assembly of the State of Illinois, or any commission of its appointment, should have the right to fix its tariff of charges for the transportion of passengers and property, the charter would *never* have been accepted.

The power to fix rates is a vital one in all enterprises of this kind, precisely as the power to fix a value upon a purchase, when made, is vital to the purchaser. It is a *proprietary* right, and belongs to the idea of property *as guaranteed by our constitution* and understood by the people, except the charter or deed of conveyance contains limitations in that regard. The whole American idea of property, supported and strengthened by American constitutions, is founded upon the present or prospective values thereof for actual use, and the possible future value of such use, to be determined, under conditions of development, by the individual judgment of the proprietor alone. The two things cannot be separated without a practical destruction of the idea of property. This may suggest another question, viz: as to the *absolute* right of the State to interfere with private property; but it is not material to my present purpose, which is merely to illustrate the importance of the right (or power) granted to the Illinois Central Railroad Company by its charter (a contract between the company and the State), through its board of directors, "to establish such rates of toll for the convey-"ance of passengers and property over the same" (its railroad), as "they shall from time to time, by their by-"laws, direct and determine, and to levy and collect the "same for the use of the said company." If its importance is conceded, *and it must be*, then this right or power is of

the very essence of the consideration for the "*contract*, "*obligation or liability*" of the company to pay a percentage of its gross earnings into the treasury of the State, from which legislature cannot release it. If it cannot relieve the company from any part of this contract, obligation or liability, how can legislation take away any part of the consideration upon which that "*contract, obligation or liability*" rests? There is no principle of, or exception to, the law of contracts, by which this result can be accomplished.

Again, the power or right conferred upon the directors of the company to establish rates of toll for the transportation of passengers and property, is not only a power or right, given by contract, but it is also *essentially* a power, coupled with an interest, for these tolls as established, are to be levied and collected for the use of the company. Such a power is irrevocable.

If the situation of this case, as thus presented, is fairly considered with reference to the recent legislation of Illinois, already referred to, and which must be relied upon by the defendants in error, to maintain their judgment, and that judgment should be affirmed, what would result, *as a necessary and logical consequence therefrom?* The grant of the right or power to establish rates of toll, is as explicitly given by the charter as any other right or power, privilege or franchise, which the charter undertakes to confer. It is of vital importance to the maintenance and operation of the railroad of the company, which is the purpose for which the company was organized, and it was given to the Directors of the company for its use and benefit, and the use and benefit of its stockholders. It was an essential part of the consideration for the agreement on the part of the company to pay to the State, semi-annually, a percentage of its gross earnings and income. The State, by its leg-

islation and the action of its agents thereunder, attempts to take away this right or power, at the same time reserving, by a constitutional provision, which legislation cannot repeal, the *contract, obligation or liability* of the company to pay the percentage. If this can be done, legislation may revoke the land grant, and, if it cannot recover the lands actually sold to *bona fide* purchasers, whilst the power to sell and convey was in force and after title vested, may yet recover against the company the proceeds of all such sales. It may also repeal the provision for exemption from general taxation under State authority, and still retain the obligation of the company to pay a percentage of its gross earnings into the State treasury. It may repeal the right of the directors to determine the width of the track, the construction of the car wheels, the size of the cars, the weight of the car loads, and "all other "matters and things respecting the use of said road, and "the conveyance of passengers and property;" it might even, but for its *cumulative* absurdity, put a limit or an end to the company's right to maintain and operate a railroad, or even to be a corporation, and the State still retain the formula of a contract, obligation or liability of the company to pay money to the State out of its *gross* earnings.

Is this what was intended by the provisions of the charter in conferring "*grants, privileges and franchises*" upon the company, and is it what was intended by the section of the constitution of 1870, relating to the Illinois Central Railroad Company, which says that the "*contract, obligation*, or liability" of the company, "*in accordance with its charter*," shall not be released, * * * "*or in any manner diminished or impaired by legislative or other authority*"?

It cannot escape observation and recognition by the court, that the question here involved, is a question of the right to control and manage the affairs of the corporation according to the provisions of the charter—precisely the question involved in the decision of the Dartmouth College case—the conservative and beneficial influence of which has been felt for more than half a century.

The questian is, *where*, under the charter and the constitutions and laws of this country, does the right and power to establish rates of toll for the transportation of passengers and property upon the road of the Illinois Central Railroad Company, lie? It cannot be in two places, or in two separate and distinct bodies at the same time. In reference to such a question there is only *one* space, and as an axiom of physics, it is established, that two bodies cannot simultaneously occupy the same space. But, in order to escape a possible criticism, which would be, if made, as unfair as it would be unreasonable, it is admitted that different persons may hold valid naked powers of attorney to do a particular act at the same time, as, for instance, to sell and convey a specific property. In such a case, the exercise of one power exhausts and abrogates the other. It cannot be insisted, that such a case is analogous to the present, and the court would simply be annoyed by a statement of the obvious distinctions. It is sufficient to suggest, that this case is between the parties to the contract, involving the grant of a power coupled with an interest. The law *as a science*, is not, or ought not to be, a matter of instinct or temporary policy. As once well stated: "The legislature act upon "*expediency*, the judiciary act upon *right*." A change of constitutions, either by literal modification, or a surrender of judicial *right* to legislative *expediency*, must inter-

vene, before this case can be determined upon any question of policy and expediency. The constitution of the United States, to which all courts, whether State or Federal, owe allegience, says: "No State shall * * * "pass any law impairing the obligation of contracts." The constitution of Illinois says that "No contract, obligation "or liability of the Illinois Central Railroad Company to "pay any money into the State treasury * * * "in accordance with the provisions of the charter of said "company, shall euer be released, * * * or in "any manner diminished or impaired by legislative or "other authority." The judiciary of the State have also said, that the charter of the Illinois Central Railroad Company is a contract. Can an act of the legislature violate it, and be constitutionally valid? Then can legislation confer upon a person, or upon a commission, a valid power to do that which the legislature itself cannot do?

I may be altogether at fault in considering so much at length, the elements of the charter of the Illinois Central Railroal Company, *as a contract*, between the company and the State of Illinois. If so, my apology must be found in the opinion of the Supreme court of Illinois, which is a part of the record in this case, upon which the judgment is presumably predicated, and in questions reserved for future consideration. This court, in the case of the *Chicago, Burlington and Quincy Railroad Company* v. *Iowa*, 94 U. S. Rept., 155, at page 161, says: "*It is now too late to contend that the charter* "*of a corporation is not a contract within the meaning of* "*that clause in the constitution of the United States, which* "*prohibits a State from passing any law impairing the* "*obligation of a contract.*"

This, perhaps, should have been considered as settling the question, as thus far discussed.

Before stating my fourth proposition, which, however, I shall not enlarge upon, I wish again, in more direct form, to suggest, that, inasmuch as the question already discussed, is a *question of power to fix rates*, the question of the *reasonableness* of rates is not involved, and the case, now under consideration, is such, in its facts, discloseed by the record, that such a question cannot properly arise. For transporting seventy barrels of salt, *presumably a car load*, the regulation of which is, *by the charter*, given to the board of directors of the company, from Chicago to Tuscola, in Douglas county, a distance of about 150 miles, the board of directors of the company, *by by-law*, established a tariff charge of twenty-eight dollars and thirty-five cents, The schedules, prepared by the railroad and warehouse commissioners, adjusted the maximum price for the same service at twenty-four dollars and eighty cents, making a difference of three dollars and fifty-five cents on the whole car load, or five and one-fourteenth cents on each barrel. If it could be conceded, that this act gave authority to the commissioners to fix reasonable maximum rates, there would still only be before the court, the opinions of two independent boards, each having the right, by special grant of power from the legislature, to fix prices, which should be reasonable. And the difference in their opinions is so little, considering the service performed, that no court could say, as a matter of judicial judgment, that, if the price fixed by the commissioners was *reasonable*, the other was *extortionate*. And how can the court, *without that further evidence*, decide between the two determinations? In putting this inquiry, I waive any discussion of the question as to whether or not individuals or corporations,

in respect to their own property and services, are bound to fix *reasonable* rates, and by this I mean such rates as shall be adjudged reasonable, in a judicial proceeding, had "according to the law of the land," which does not mean according to the judgment of one party to the contract or its representatives, but according to the judgment of a tribunal, instituted and organized under general laws, for the determination of matters of difference between conflicting interests. There is no constitutional ground upon which a charge could be predicated, that a citizen was guilty of extortion, without requiring affirmative proof of the fact from witnesses produced in open court, giving him an opportunity to show that the charge was unfounded, not according to the judgment of one informer, or a commission of informers, but according to the facts and circumstances of the case, to be developed on the hearing. It would be anomalous in theory, under our constitution, and unreasonable and unsatisfactory in result, if it should be claimed, that legislation could definitely say that a citizen could be adjudged guilty of larceny in taking and appropriating to his own use, a particular article of property, without reference to the question whether the property rightfully belonged to him or to another. All citizens would have good cause to doubt the constitutionality of such a legislative act, and no court would sustain it. Now, what is the difference in principle? for it is the principle that is involved, and not the special application of it. By the convention of the parties, held to be a contract, "which cannot be changed or annulled "without the consent of both contracting parties" (31 Ill., 485), the power to establish rates of toll for the transportation of passengers and property over its road, is given by the State of Illinois to the board of directors of

the Illinois Central Railroad Company. More than twenty years after, the State of Illinois, having no power of itself to change the contract, says in substance to the company: If you charge more than the amount of compensation fixed as a maximum by a commission of my own selection, you shall be deemed guilty of extortion, and be fined, in sums, dependent upon repetitions of the offense, from not less than $1,000, up to $25,000, the latter being the fixed penalty for the fourth and all subsequent violations of the commissioners' schedules.

But it may be suggested that the commissioners' schedules are only made *prima facie* evidence of reasonable maximum rates, and, therefore, greater rates are only presumptive evidence of extortion, and may be rebutted. This qualification, in law, makes no difference, because in an action, essentially criminal, it creates a presumption of guilt, contrary to the constitutional presumption of innocence, and upon *ex parte* evidence. Such laws have been held to be constitutionally invalid in Vermont and Rhode Island, where their constitutionality has been tested, and for unanswerable reasons.

Plimpton v. *Town of Somerset*, 33 Vt., 283.
Francis v. *Baker*, 11 R. I., 103.

The right of trial by jury, or according to the law of the land (expressions of equivalent meaning) "as heretofore enjoyed," is trenched upon and violated by such limited legislation. The power conferred by the charter upon the board of directors of the Illinois Central Railroad Company, is, at least, a power to establish reasonable maximum rates, and as a legally constituted body, no presumption can be indulged in against the reasonableness of its acts, and no othe *ex parte* judgment can be judicially accepted as superior in authority and influence as evidence,

except with the consent of the company, an element which is wholly wanting in this case.

Returning, therefore, to the proposition, with which I commenced this particular branch of the discussion, I repeat, that the question here presented, is a question of *power to fix rates*, and not at all a question of the reasonableness of the rates actually involved. The latter may or may not be satisfactory, or reasonable. Whether reasonable or not, the court cannot determine from the record. But if the present rates, as fixed by the railroad and warehouse commissioners, could be held to be reasonable, and, therefore, presumptively binding, what is there in the law to prevent them from fixing the maximum rate for the transportation of seventy barrels of salt over the Illinois Central Railroad from Chicago to Tuscola, at ten dollars, or even one dollar, instead of twenty-four dollars and eighty cents? Can the court say, that *legislative policy* is a protection against this? In am not quarreling, now, with the *exercise* of the power; my contention is against the *existence* of the power; and I say again, that such a power cannot be lodged in two places at the same time. If it cannot be dislodged from its first resting place, it cannot be bestowed elsewhere, and for the reason that the first grant of it exhausted the granting power. It is a cheap and plausible suggestion, and may, perhaps, be made, that the people will not abuse such a power. Experience with legislative bodies, does not not justify the suggestion; but the argument is, *that vested rights are not dependent upon the legislative discretion or policy, either in respect to their value or disposition.* Discussion in any other direction than this, does not meet the issue which is here made. The question is one of vested right, of a power coupled with an interest, of a grant, privilege or

franchise secured by contract, within the meaning of the constitution of the United States, which says that no State shall pass any law impairing the obligation of contracts and of a contract, the obligation of which, the legislature of Illinois, even with the consent of the railroad company, has no authority to *in any manner diminish or impair.*

IV.

It is the right of the citizen, under our constitution, in the absence of contract with the State or other public authority, without regard to the special uses to which his property may be legitimately devoted by him, and so long as he retains his individual ownership and power of disposition, to charge for it and for its use, such sum as he pleases, or can agree upon with others. The right of valuation, both of the property itself and of its use, is an essential part of ownership, inseparable from the idea of property and authority of disposition, and, as such, is not within the control of State legislation.

I think, this propoisition is sufficiently guarded in its language, when properly considered, to express what I am willing to defend as a constitutional right; but as language does not always convey the same meaning to different minds, I will say, that by the words of restriction I intend to exclude:

1st. Those powers of government, which are, *probably*, independent of constitutions, but can only be invoked in cases of great public emergency, as in the case of war, insurrection or rebellion, when the life of the state is in issue, or in the case of a pestilence or famine, seriously threatening the life of the people.

2d. The proposition excludes the power of *eminent domain* in all its forms, regulated by law and as commonly understood.

3d. The proposition excludes all cases of dedication of property to public uses, such as streets and public grounds, specially set apart for those purposes by the proprietor, which interfere with the ownership and right of disposition.

4th. The proposition provides for and accepts, what is denominated the *police power* of the State, and is not intended to call in question that power or its *rightful* exercise.

The proposition, although thus limited, may still be said to antagonize the doctrine of the case of *Munn* v. *Illinois*, 94 U. S. Rep., 113, and 69 Ill., 80, and because of the reference made to it contained in some of the railroad cases, reported in the same volume of the United States Reports, I have been, *with difficulty*, persuaded to omit from this argument, some suggestions upon that case. I am sure, however, that the doctrine of that case will not be extended, and it does not readily occur to me how it can here be made applicable. I therefore content myself with a protest against the reasoning and results of the Munn case, and with the expression of the hope, that a proper occasion for a discussion of its merits may arise, before the theory of it shall become fixed in our jurisprudence, under the rule of *stare decisis*.

V.

If State legislation cannot recall a grant made by the State, and cannot violate a contract entered into by the State, consistently with the integrity of constitutional guaranties, is there any power in goverment, AS SUCH, *under our American constitutions, which enables it,* THROUGH LEGISLATION, *to override such grants and contracts, and thus, in effect, abrogate such guaranties?*

The court will bear in mind the limitations thrown around my fourth proposition. The proposition itself was intended to cover them. I willingly admit, that it is the paramount duty of a civil government to protect itself and the people as such—that is, the aggregate people, over whom its jurisdiction extends. Constitutions are *chiefly* intended for the regulation and management of internal affairs, and under ordinary conditions. It is unnecessary here to make the proposition broader. And for this reason, and for present purposes, I admit that the constitutional guaranties, in favor of life, liberty, and property, which are personal in their application to the citizen, are intended to have force under usual governmental conditions. I admit, also, that in times of great national emergency, as in case of war, pestilence and famine, threatening the existence of the government or the people, the government may protect itself and the people under its charge, by any and all possible means, just as one man may kill another for the protection of his own life. This would involve the taking, *under such emergencies*, of private property by authority of executive officers of government, such as commanders of armies and sanitary commissions, as the emergency might require,

leaving the matter of settlement therefor to be adjusted with the proper State authority. But in all such cases, the taking could only be justified on account of the public emergency. The conditions of life would not and could not wait upon constitutional methods, and this government, at least, has liberally recognized such claims. But I submit, that this case, as here presented, calls for the application of no such principle. I am willing, for present purposes, to go further and admit, that whilst, in such emergencies, the executive power is the one, chiefly called into requisition, the legislative authority, if organized and available, may add strength and support to executive interference, and make more binding, morally, if not legally, the pledge of indemnity, impliedly given by executive authority, against personal loss for the common good. There was, however, no occasion calling into exercise this power, either through executive or legislative agency, when the railroad and warehouse laws of Illinois were passed; nor can either of these laws stand on the right of eminent domain, or of taxation, nor upon the basis of voluntary dedication, interfering with ownership and the right of disposition. The police power must disown them. Then where is their resting place? Under what head of legislative jurisdiction do they fall? They were numerous, in Great Britain, prior to the reign of Elizabeth, and rested, then, upon the absolute legislative power of the British Parliament. Froude says, however, that, in England, they went out with "the fires of Smithfield."

V.

The tendency of the advocates of the rights of political control over private property interests, furnishes a strong argument against the existence of such right, under our constitution of government.

No extended examination of what has been termed the "Granger Doctrines" can here be undertaken. I will deal simply with what may be considered *two prominent expressions* of them. The references I shall make relate solely to railroads, and it cannot be doubted, that they are of sufficient importance to stand as *representatives* of the doctrine they announce, both as to its policy, its reasonableness and its validity.

In considering the propositions thus authoritively presented to the public and to the courts of the country, as a part of the public, this court will bear in mind the limitations of the present constitution of Illinois upon the legislative power of the State, in respect to matters of railroads and canals already referred to, and that the present case arises under Illinois laws, passed since the adoption of that constitution.

In a letter addressed to the "Committee on Railroad "Transportation of the New York Chamber of Com- "merce," under date of November 20, 1880, accredited to a venerable and distinguished member of the bar of this court, extensively circulated through the public press, he is reported to have given expression to very advanced and decided sentiments, founded, in the main, upon a statement of premises, as follows:

"The legally vested rights of railway companies, like

"other rights of property, are sacred, and no violation of "them comes within the scope of your design. *But on "this question, railroad men misunderstood their situation.* "They believe, or pretend to believe, that railways are "the property of the corporations authorized to run them, "which is a cardinal error and the parent of much false "argument. *A public highway cannot be private property, "and a railroad laid out and built by the authority of the "State for the purpose of commerce, is as much a public "highway as a turnpike road, canal or navigable river.*"

Upon this characteristically weak and slippery foundation, the whole text of the letter rests. The whole groundwork of the contention is taken for granted, but would never be conceded by any court having respect for the law governing corporations and defining their rights. The statement of the claims of railroad men is *preposterously* untrue; and there is no one who knows this better than the writer of the letter. His premises are good for a campaign speech against railroads, and in the interest of a granger movement, but miserably fail, when tested by any intelligent standard of law or of fact. No railroad man ever claimed that his company was the owner of the road operated by it, on the ground *simply* of *operation.* Again, he says: "A public highway cannot be private property." This may be admitted: but when he adds that "a railroad "laid out and built *by the authority* of the State, for the "purposes of commerce, is as much a public highway as "a turnpike road, canal *or navigable river*," he has absorbed the whole question in controversy and *dogmatically* asserted, as the foundation for his argument, what *is not true*, either as matter of fact or as matter of law. Whether a railroad is as much a public highway as a turnpike, a canal or a navigable river, depends, or *should* depend,

upon elements not suggested by the statement, and the doctrine as stated, is utterly subversive of *private rights*. It is a generalization of things, which are, or certainly may be, utterly incongruous. Navigable rivers, as such, belong to the State for the purposes of commerce, and are *public highways*, especially those rivers made the boundaries of the adjacent lands in the government grants. Nobody ever questioned such a proposition. Turnpikes and canals are public highways, in the broad sense of that term, when built at the public expense for purposes of commerce, and rivers, turnpikes and canals thus situated are necessarily under government control, in respect to all the incidents of their use, including compensation for such use. This admission carries with it the necessity for distinction between public and private ownership; for it gives to ownership the right to dictate, or by agreement to fix, charges for the use of property.

The proposition of the honorable counselor makes no distinction between railroads, turnpikes and canals constructed at private cost, and those constructed at the public expense. *Ownership* does not depend upon a *mere naked power to authorize*.

If we follow the proposition down to its relations to the pending case, we find, that at the time of the passage of the charter of the Illinois Central Railroad Company, the State of Illinois was, by its constitution, practically prohibited from engaging in works of internal improvement, a prohibition more strongly expressed in the constitution of 1870, and by this we must understand, a prohibition against engaging in the building of railroads, turnpikes and canals. Still, under the constitution of 1848, the State, acting through its legislature, either by general or special law, and under the constitution of 1870 by gen-

eral law alone, retained the power to authorize the organization of private corporations, and empower them, *by and with their own means*, to do what the State itself could not do. The State, by virtue of its authority, grants to the corporation the right to acquire property *by paying for it*, every item of which must be acquired *by agreement* with other private *owners*, except as to the naked right of way, and as to this, the State provides a *compulsory* proceeding, *useful only* in emergencies, where agreement is impracticable, and which is available only upon condition of paying "just and fair compensation." Now, where property has been acquired in this way, to whom does it belong, as matter of ownership? Who has paid for it? Even if title were not taken directly, it is a familiar doctrine in equity, that a resulting trust will be declared in favor of the party paying the purchase money; but, in all cases, and especially in the case now at bar, the title has been taken to and in the name of the corporation, *by which the purchase money was furnished*. Law and equity, therefore, combine to vest the title in the actual purchaser, to wit: the railroad company. Millions of dollars of private money have secured this ownership. And yet the venerable counselor says, that "a railway "(evidently meaning any railway), is as much a *public* "highway as a turnpike, a canal *or a navigable river*"; a proposition which allows nothing for the conditions of purchase, the rights granted by charters, or the distinctions which rightfully grow out of the differences between investment of *public* or *private* funds, in respect to ownership. There must be some mistake here.

For many years, Angell & Ames on Corporations has been regarded as a standard work in the profession, and, so far as I know, by the courts. It may not do to quote

it in *private* letters for *public* use; but it is still good authority; and, in this standard work (so regarded I believe), on page 23 of the 9th Edition, the following is stated (the italics being my own):

"*Private corporations* are indisputably the creatures of "public policy, and in the *popular* meaning of the term, "may be called *public; but yet, if the whole interest does* "*not belong to the government* (as if the corporation is "is created for the administration of civil or municipal "power), the corporation is *private*. A *bank*, for instance, "may be created by the government for its own uses; but "*if the stock is owned by private persons*, it is a *private* cor- "poration, *although it is created by the sanction of public* "*authority, and its objects and purposes partake of a public* "*nature*. *Rail-roads* are *private* corporations, and, 'gen- "erally speaking,' say the court, in the case of *Bonaparte* "v. *Camden, etc., Railroad Company*, '*public corporations* "*are towns, cities, counties, parishes, existing for public* "*purposes; private* corporations are for banks, insurance, "roads, canals, bridges, etc., *when the stock is owned by* "*individuals;* but their use *may be public*.' In all the last "named and other like corporations, *the acts done by them* "are done *with a view to their own interest*, and if thereby "they *incidentally* promote that of the public, *it cannot rea-* "*sonably be supposed they do it from any spirit of liberality* "they have beyond that of their fellow citizens. *Both* "*the property and the sole object of every such corporation,* "*are essentially private, and from them individuals com-* "*prising the company corporate are to derive profit*."

Is not this a bare but accurate statement of elementary law? Did the State, when it granted the charter of the Illinois Central Railroad Company, make any reservation to itself in contravention of this principle, so far as needed in its application to this case? Is there any reservation of

ownership in property acquired by the company, or of the right to fix prices for its use? It was competent for the State to insert such provisions in the charter of the Illinois Railroad Company as it pleased, and if accepted, all reservations and conditions thus made, would have bound the company. Railroad men do claim, *and with reason*, that property, the title to which is taken in the name of the company, and is paid for with the funds of the company, *belongs to the company so purchasing and paying for it*, and that the company so purchasing and paying for property has the right to control and manage it for the purposes of the company, and within the scope of the powers granted to it? Did the venerable letter-writer intend to deny this?

On this quesion I invite attention to the case of *Railroad Company* v. *Maryland*, 21 Wallace, at page 470, where I find the following: "The navigable waters of "the earth are recognized public highways of trade and "intercourse. No franchise is needed to enable the navi- "gator to use them." And further on, in the same opinion, I find this: "And when, in process of time, canals "were constructed, no amount of tolls, which were ex- "acted thereon by the State or the *companies* that owned "them, was ever regarded as an infringement of the con- "stitution. When constructed by the State itself they "might be the source of revenues, largely exceeding the "outlay, without exciting even the question of constitu- "tionality. So when by the improvements and discov- "eries of mechanical science, railroads came to be built "and furnished with all the apparatus of rapid and all- "absorbing transportation, no one imagined that the State, "*if itself the owner of the work, might not exact any* "amount whatever of toll or fare on freight, *or authorize*

"*its citizens or corporations, if owners, to do the same.*
"Had the State built the road in question it might to this
"day, unchallenged *and unchallengeable*, have charged two
"dollars and fifty cents for carrying a passenger between
"Baltimore and Washington. *So might the railroad*
"*company, under authority from the State,* IF IT SAW FIT
"TO DO SO. *These are positions which must be conceded.*
"*No one has ever doubted them.*"

But there are more progressive ideas afloat, than are contained in the letter referred to. The *growing innovations* develop themselves in sections, which, sometimes, overlap each other. If the writer of the letter intended to say that railroad property was *public* property, his proposition would be readily understood, and, if accepted, we should start upon a new departure with a new axiom as a foundation. Concede the axiom and the whole of his theory gets on amazingly.. But now comes the learned Attorney General of Illinois with another theory, which he presents as a solution of all railroad problems, and, in an argument of extended proportions, presented to the Circuit court of Sangamon county, Illinois, at the October Term, 1881, in the case of *The People, &c.*, v. *The Chicago & Alton R. R. Co. et als.*, near its conclusion he says: "If railroads were recognized *in all re-*
"*spects as public highways—as is now the tendency of*
"*the courts—and the corporations operating them as gov-*
"*ernmental agents or officers, receiving their compensation*
"*from the legitimate earnings of the roads, and all persons*
"*advancing money* to build and equip them as being en-
"titled to receive, *from the earnings*, such a liberal per-
"centage above the legitimate expenses as would be an
"inducement to invest their capital in these enterprises,
"*many political* as well as judicial questions would be

"readily settled; the government, then, without taking "control of the roads *directly*, would have such *unques-* "*tioned* and *supreme* supervision over them, that *all ques-* "*tions* arising could be at once determined upon *well* "*known* and *well settled* principles of law, and it does "seem to me that *this must be the inevitable result of the* "*doctrines now settled* and in process of settlement.

"The creation of railway commissioners to control rates "of freight and passage; * * * * can have no other "end than the establishment of the doctrine that the State "has the supreme control over the roads and the acts and "conduct of the corporations that operate them. And "then take in connection with this fact, that the courts "have settled that these corporations are quasi public cor- "porations; that their first and paramount duty is to the "public; that if they fail to perform their duty to the "public, their franchises and all their property may be "forfeited to the State; that they cannot do acts detrimen- "tal to the public interests; that they have and assert many "of the sacred and sovereign prerogatives of the govern- "ment, and we have pulled down all the barriers that "stood between us and the bold declaration, *that they are* "*a part of the government*, and as such under the control, "absolutely, of all the laws, duties, obligations and re- "sponsibilities of a branch of the executive department of "the government."

What does this mean, except that the State shall constitute itself the guardian, without bonds or limitation of authority, over this class of private investment, forcibly resume the powers granted by it, substituting the discretion of the political power in the place of the business judgment of legitimate owners, and compelling the private ownership to stand responsible for all the misadventures,

the blunders, follies and rascalities, which *always* attend business enterprises undertaken through the agency of political machinery? What a vast and open field is here disclosed for patronage, to the aspiring politician! Think of it! Railroads, *public highways* and railroad companies, *public agencies!* Everything subject to political manipulation, and the control shifting from side to side, in accordance with the changing results of political elections!

Is the picture an encouraging one? Would the millions of people, traveling over the railroads of this country annually, feel any greater confidence in such a management than they do in the present? Would it be expected, that the road bed would be more substantial, the cars in better order and the engines in better condition, than they now are, that transportation would be safer and life more secure?

In the 116,000 miles (approximately) of railroads in this country, with their depots, rolling stock and other facilities for business, there is invested at least $5,000,000,000 of *private* capital, an amount larger by one-fourth than the national debt of Great Britain, and nearly double in amount the debt incurred by this country in the war of the rebellion. Before this array of figures, almost beyond comprehension, *it is well to pause;* for, according to the statement of the attorney general of Illinois, we are on the brink of radical changes in respect to its control. That this aggregation of wealth, if harmoniously administered, would be a monstrous power for good or evil, is admitted. It could almost buy the world, if deposited as a margin; and it is not surprising, perhaps, that the man who contemplates its magnificent proportions as an aggregate, and begins to speculate upon the *possible evils*, which it could accomplish, *giving no heed to the fact of its*

distribution, and the conflict of interests everywhere developed between its segregated parts, should begin to imagine direful consequence, even to the extent of the subjugation of the political power of the State. The danger of the latter, however, lies rather in the fact of contention with the political power, than in a careful respect by the latter for the rights of private property. Suppose it to be admitted, that the political motive for the establishment of *private* corporations is, or should be, the public advantage, and that *when* they became *subversive* of this purpose, the object of their creation has failed to that extent, and the State may resume its grants as for a condition broken; still, I could safely challenge the court or counsel to show that railroad corporations, as a whole, have not, of their own motion, more than fulfilled all the demands of public convenience, which they were intended to subserve. Individual complaints and dissatisfaction connect themselves with every business, whether *public* or *private*. Such annoyances reach down to the poorest conditions of social life. If such elements are to be considered in the settlement of grave questions of *political power* and of *property rights*, *then* everything may go to the political power, as *parens patriæ*, the conservator of *domestic affairs*, and we must hereafter rely on the government to take care of us. I had supposed that something beyond this was required of an American citizen.

Now, let us bring the opposing propositions as to corporate individuality, and the disability of the State to interfere, down to the conditions of the present case. If imagination is vigorous enough, counsel and courts may float about in the regions of the unreal and make sport of facts as they are. There is no low to prevent any one from doing this, although, as a general rule, it is better

that the feet be kept upon the ground and travel with some regard to the accustomed routes. I assume, that it will not be denied, that something is due to persons and to personal rights, and that the *faith of the State* (a politician's phrase) does not mean *repudiation of contracts.* We are confronted with two propositions: 1st. That railroads belong to the State. 2d. That railroad companies, and, as a consequence, their officers and employes, are State agencies. Both propositions are claimed as legal deductions, the latter as settled or in process of settlement under the decisions of the courts of the country. Either of these propositions, if settled affirmatively, changes the control of a *private* investment of $5,000,000,000 from the hands of the investors into the hands of the government. Of this investment, Illinois represents about one-tenth, or $500,000,000, there being in Illinois about 10,000 miles of railroad, mainly constructed under private charters passed since the adoption of the constitution of 1848. Of this 10,000 miles of railroad, the Illinois Central Railroad Company claims to own, within the State, about 706 miles, and to have the right to control it for its benefit and the benefit of its stockholders, under the provisions of its charter, granted by the State. The language of the charter is clear and unmistakable. Now, in one view of this case (and it is an important one) it is of little consequence, whether the opinion of the distinguished letter-writer, or the opinion of the honorable attorney general of Illinois, as quoted from his argument, is presented here or not. Both are developments of what has been termed a *novel doctrine.* The fact that they overlap each other as propositions, is of no importance. Both point in the direction of *supreme* legislative control over private investments in railway property; and the suggestion that the

tendency of *some* judicial decisions, is in that direction, *cannot be denied.* The *novel doctrine* runs in that channel. The results of the theory in either case, will *override contracts, grants, the plighted faith of the State, the sacredness of private property, constitutional guarantees for the protection of private rights,* and everything else which stands in its way. Public property and public agencies are always subject to the control of public authorities. Idiocy alone would be found denying so plain a proposition. The smallest infusion of business sense and common understanding, respecting business transactions, must, however, detect that there is some mistake somewhere in these propositions. Five billions of private capital is not, and has never been risked, *intentionally,* on such a tenure. I do not pretend to argue now, that it is not competent for the State to offer its services as managers of private capital, on the terms stated in either of the propositions. The State may say to capitalists, build a railroad, subject to State management, and the State will pay you *out of net earnings* of the road, if any, an interest on your investment, the organization to which you contribute, and all its officers, being the agents of the State; but the State will assume no responsibility for proper management, and shall not be liable for official service or otherwise. What a cheering overture! With what alacrity the capitalists of the world would avail themselves of so munificent an offer! No State bond, no State obligation of any kind (the constitution prohibits them), and simply an offer, in the interest of the public, to take charge ("*supreme control*") *of private money, trusting to the honesty, integrity and ability* of the *political power* of the State for its *business management.* Were these the conditions under which the corporators and bondholders of the Illinois Central Railroad

Company invested their money? The writer of the letter knows they are not. The attorney general of Illinois knows they are not; but what is of more importance, the court, which must ultimately settle the controversy here presented, must decide, that no such conditions were ever proposed, much less, accepted, in the charter of the Illinois Central Railroad Company, which is *the contract of the State.* To-day the State of Illinois could find money to build thousands of miles of railroad within its borders, upon the faith of its bonds, if this were permitted; but it could not build a mile nor an inch of railroad, *upon any mere pledge of its business management.*

I have called attention to these two representative productions in the line of railroad literature, for the purpose of showing to what extent the courts are expected to go in assisting the political power of the States in the grand larceny project of appropriating to itself the use and control of private property and its investments, *after these investments had been made under pledges of protection* by the same political power, fortified against interference and made permanent, except *by mutual consent*, by the provisions of the federal constitution. Will the court follow such leading?

VI.

Opinion of the Illinois Supreme Court.

The Supreme court of Illinois has delivered itself of a *dissenting* opinion in this case and nothing more. Looking at the opinion as one involving large interests, both of a public and a private character, I am led to the conclusion, that the questions involved were approached by that learned court with something of the feeling which

pervaded Abbot Boniface, in charge of a monastery on the border, during the predatory wars between England and Scotland. He was instructed by his superiors to stand firmly by the hierarchy, its rights and privileges, and the author says: "These missives Abbot Boni-"face received *with an important air of helpless-*"*ness or a helpless air of importance*, whichever the reader "may choose to term it." I mean no reflection upon the learned judge, who wrote the opinion, from which he dissented, probably under some pressure from his brethren on the bench. There are precedents for such opinions, which, like certain customs, are "more honored in the "breach than in the observance." By the opinion, this case is thrown back upon the case of *Ruggles* v. *The People*, *&c.*, 91 Ill., 256, which has been brought to this court upon writ of error, and stands earlier on the docket than the case now under review.

The Ruggles case was not like the present one, except as one might say (truthfulness and integrity of judgment being discarded) that an act of the State legislature was the *supreme law of the land, all constitutional prohibition to the contrary notwithstanding.*

In the case of *Ruggles* v. *The People*, 91 Ill., at page 261, the Illinois court says:

"When the general assembly brings into existence an "artificial person or corporation, it may at pleasure endow "it with such facilities or powers as it may deem proper "*and for the benefit of the corporators and the public.* It "may grant or withhold powers at pleasure; *but it is* "*believed that body is powerless to confer greater or more* "*unlimited powers than are possessed by natural parsons.*"

This language indicates a surprising want of judicial

apprehension and a startling forgetfulness of the elements of the law upon the subject *professedly* discussed.

But there is another part of the opinion of the Illinois Supreme court in the Ruggles case (page 261) which is deserving of notice, and which shows how *maxims* of law may be misapplied. The court says:

"It has been repeatedly held by this court, that when "a corporation is thus created, it becomes amenable to "the *police powers* of the State, to the full extent that "natural persons are subject to its control.

"This doctrine was fully recognized and announced in "the case of *Ohio and Mississippi Railroad Co.* v. *Mc-* "*Clelland*, 25 Ill., 140; *Galena and Chicago Railroad Co.* "v. *Loomis*, 13 *id.*, 548 *Galena and Chicago Railroad Co.* "v. *Dill*, 22 *id.*, 204, and has been announced in numer- "ous subsequent cases, as applicable to the police power "of the State, and is the settled doctrine of this court, "*and it is referable* to the maxim *salus populi suprema est* "*lex*. It is for the protection, safety and best interests of "the people that governments are instituted and main- "tained."

The cases cited uphold the police power of the State, as intelligently understood, but they do not cover the class of powers which may be grouped together under the maxim referred to. Under all ordinary conditions the police power is one of regulation of use, and not of absorption of the use. As applied to property it prescribes rules for the conduct of business, in order to guard the public health, the public morals, and the peace and good order of society, and is subordinate to constitutional provisions for the protection of *life*, *liberty and property*. If maxims of the ancient law are of importance, the police

power, in ordinary conditions of government, has a *truer and better foundation* in the maxim of law—"*sic utere tuo, ut alienum non lædas.*" There is no fixing of arbitrary or maximum rates for the use of *private* property involved in either maxim, and the latter virtually excludes it.

It is beyond controversy, as a matter of law, that corporations may take by legislative grant, rights and powers, not pertaining to the natural person as a citizen, even though it may be equally beyond controversy, that corporations, organized by State authority, are limited as to the rights and powers which they may have and exercise by the provisions of the acts of incorporation. The rights, powers and privileges *expressly granted* are not superadded to those of the natural person. The latter may be a farmer, a mechanic, a banker, an insurer, a merchant, or a broker, or he may, in general terms, engage in any business recognized as legitimate, and he may carry on all of these business enterprises at the same time. A corporation might, *possibly*, be organized, with all the rights and powers of natural persons, and with additional rights and powers supplementing those, for special purposes; but I am not advised of any such example. In this country, corporations have been organized for special and limited purposes, and the courts have held them strictly to the exercise of the powers granted to them for the special purposes of their organization. Stating the proposition concretely, a railroad company cannot become a merchant, a farmer, or a banker, but can only construct, maintain and operate a railroad. The wide field of business enterprises, open to the natural person, is shut out. To enable the company to accomplish the purposes of its organizations, powers, not possessed by the natural person, are granted, and this may legitimately be done, because of

the benefits presumably and incidentally resulting to the public or the State from the completion and successful operation of the enterprise contemplated and provided for. The powers, specifically granted, are assumed to be necessary ones for the accomplishment of the purposes intended, and if it is competent for the State to make the grant, the right or power thus granted, *attaches, according to the terms of the grant itself. An absolute and unconditional grant (power to make it being conceded) vests the right or power conferred, according to the terms of the grant.* In such cases there can be no *mental* reservations. *Limitations must be expressed.* In saying this I do not wish it understood, that I am overlooking the police power of the State, properly considered, and as I have undertaken to define it in its application to property. Bringing the question down to the present case, what I mean to assert and maintain, is, that an absolute grant of a power to fix rates or prices, or the possession of such right, however acquired, is not amenable to the police power. The police power, legitimately exercised, does not deal directly with the prices of property or the prices of its use. There are many kinds of property, in the uses of which the community or the public are, to a greater or less extent, interested. Allow me to suppose a possible one. A, by accident, or a careful exercise of good business judgment, has become the owner of a lot of land favorably located for business purposes. He purchased and paid for it. His title is absolute and undisputed. It is so situated, that the public find it convenient, if not necessary, to avail themselves of its advantages for certain business purposes, and on this account it is valuable, and has been improved with reference to the demands made upon it. It yields an income of $10,000 per annum, and is, therefore, worth at least

$100,000. It may be that, by reason of its special advantages, it would fall within the definition of property liable to be taken for public use under the power of eminent domain. Yesterday, income and value were as above stated. To-day, the legislature says that A is charging too much for the use of his property, and, for the future, he shall only be entitled to charge and collect one-tenth of the former rates. Income is reduced to $1,000, and the value to $10,000. It is not necessary to stop here. Another legislature says the charges are still too high, and again decimates them. The income is now $100, and the value $1,000. Then the legislature, in its wisdom, concludes to condemn the property for public use, and, as the direct consequence of its unfriendly legislation, the State is enabled to become the owner of the property for $1,000. What has become of A's $100,000 of property value? We see where the last pitiable morsel has gone; but where is the $99,000? The State like a huge boa constrictor, lies complacently by, congratulating itself upon having swallowed a breakfast worth $100,000—at the expense of one of its citizens, and at the miserly cost to itself of only $1,000. Is this protection to private property? What makes one-quarter of an acre in the centre of a populous city worth more than a thousand acres twenty miles away from it?

VII.

The Fourteenth Amendment to the Federal Constitution forbids the passage of such acts of legislation by the States, as the one here involved.

"No State shall make or enforce any law which shall "abridge the privileges or immunities of citizens of the "United States. *Nor* shall any State deprive any person "of life, liberty or property, without due process of law, "nor deny to any person within its jurisdiction the equal "protection of the law."

Sec. 1 of 14th Amendment to Const. of U. S.

. This amendment to the United States Constitution is simply a restraint or limitation upon the legislative powers of the several States. It concerns *property* as well as life and liberty, *and protects all alike;* and it is *private* or *individual life, liberty* and *property* which is referred to. The constitution and laws of Illinois, involved in this discussion, have had their origin since the adoption of the amendment to the federal constitution above quoted. Will this court say that there is still left to the States the power to *whittle* down the value of *private property* by unfriendly legislation relating to its income, until the bare bones of property only remain, without returning to the owners *just compensation* for the valuable portion thus abstracted and appropriated? If so, the same *whittling process* may be applied to *life* and *liberty*, until but a skeleton of either remains to remind the people of *the degree of protection* which *written constitutions* are capable of affording. Such a doctrine would say to the State: "Put in your knife, "when and where and how you please, so that it does not

"extinguish the vital spark. Shear off the limbs one by "one, stop the ears, close the eyes in perpetual night, "make speech impossible and life itself a misery and a "burden, and still what is left is the *full measure of life*, "which the constitution of the United States prohibits "you from taking." The parallel as to personal liberty might be drawn, but the subject is too revolting for contemplation; and yet *life*, *liberty* and *property* are protected, if protected at all, by the same constitutional guaranties, and in the same language:

"The restraints upon the power of the government *to* "*take life* apply with equal force to any attempt *to injure* "*the body*."

Pomroy's Municipal Law, § 638.

It is true that the picture of a man deprived of his property is less harrowing to the sensibilities and excites a smaller degree of sympathy than that of the man shorn of his "fair proportions," and by devilish arts, reduced to the lowest dregs of life. Even the Cyclops is commended to our pity, as we see Ulysses thrust the heated poker into his single eye, and twirl it in the shriveling socket, and listen to his groans and lamentations, expressive of physical suffering. But, after all, sympathy and pity have little to do with the meaning of constitutions and are a poor foundation upon which to rest legal distinctions. The question here is not one of *sensibility* but of *constitutional right*. The constitution and the courts say to the States, *not one foot* shall you take from a man's acres, except by agreement with him, or by virtue of judicial proceedings, had in accordance with the law of the land, and upon the payment of just compensation therefor. How, then, can the State *appropriate the very heart and life of all his acres*

without agreement, without trial of any kind, without remuneration and simply by force of a *legislative edict?*

Pomroy's Municipal Law, Secs. 633 and 669.

Sedgwick on Stat. & Const. Law, p. 16.

Another suggestion which I wish to make, and may as well make here, is, that an act of parliament held valid by the English courts, is not, on that account, necessarily valid here. Parliament legislates under no disabilities of written constitutions, in the American sense. In other words, *there is no English constitution, which an act of parliament may not abrogate.*

Sedgwick, at the page above referred to, and after noting the essential features of the English constitution, says: "These, however, are all but parliamentary enact-"ments, or regal concessions, intended to operate as checks "on the kingly prerogative. *They furnish no safeguard* "*against abuse of legislative authority.*

Pompoy says (Sec. 683): "In construing the federal "constitution, *we cannot, then, transfer all the acts of the* "*English government to our own and make them prece-*"*dents.*" And, it is not unlikely, that Jefferson may have had this precise question in mind, when he gave utterance to the sentiment, that the danger of *tyranny* in this country, under the federal constitution, resided in the organization of its courts and their control over questions of constitutional law.

There are certain phraseologies which have crept into the literature of the law, without definite force or meaning, and especially with reference to the business of the common carrier. They, sometimes, serve as masks, under cover of which to get rid of troublesome questions,

and, in many cases, they have been violently wrested from their original purpose. Such are the statements, that common carriers "*exercise a sort of public office*," or are in the exercise of "a *quasi public employment*." These phrases, it is said, had their first judicial endorsement in the case of *Coggs* v. *Bernard*, 2 Ld. Raymund, 909, which is supposed to have fixed the stringent and, in some respects, onerous responsibility of common carriers as insurers to their customers, and to have established the distinction between their liability and that of other bailees for hire. This rule of liability and the distinction thus originated, are not now objected to, although the reason for them, it is conceded, has long since passed away. What do these phrases, "a sort of public office," and "a *quasi* "public employment," mean, or will the courts continue to use them without meaning? I suppose, they were intended to signify that the carrier was doing that, with the consent or acquiescence of the public or the government, which the public or the government might itself do; that is, furnishing certain facilities for the general business of the country, which the State itself might furnish, if so disposed. It seems a little singular, however, if this is so, that, in the only branch of this business undertaken by the government, such a broad difference should be made upon the question of liability.

The government undertakes the transportation of the mail matter of the country, and a letter sent by private conveyance, even, is, or has been, required to pay its tribute to the postal service of the country; but what court ever held the government liable for the loss of mailable matter? Again, if my definition of the phrase is admissible, how can they be made applicable to railroad companies in a State where, by the express provisions of its constitution,

the State is prohibited from engaging in the construction or operation of railroads? It is difficult to see how that can be "a sort of public office," or "a quasi public em-"ployment," which the public is prohibited from engaging in, and which, by the very terms of the fundamental law, is exclusively committed to private enterprise, or how the public can be justified in fixing prices, *maximum or otherwise*, *reasonable or unreasonable*, upon property, or the use of property, the title to which it cannot by any possibility acquire—and where the right to do this has been explicitly granted away. Will not this court pay respect to the constitution of Illinois, as well as to its legislative acts?

The indefinite phrases referred to, belong, in their origin, to a time when the conditions of social and political life were very different from those now existing, and whether my interpretation of them is admissible or not, the change in conditions should have some influence in determining their present application. They were introduced when the business of the common carrier was transacted upon the highways, built, owned, controlled and kept in repair at the public expense, toward which the carrier, *as such* contributed nothing. In his business was invested simply the cost of his van or coach, and the horses by which the vehicle was drawn. *The way was furnished by the public.* Suppose it was admitted to be reasonable, that, under such circumstances, the public might prescribe rates of toll or fare; would it, therefore, be reasonable that rates of toll or fare should be fixed by legislation, where every element of cost, including the roadway, is furnished at the expense of the carrier? An *unprejudiced* mind can hardly fail to appreciate the difference suggested. In the case of railroad companies, the whole outlay, necessary

and incident to the carrying business, is a *private* investment. Not a dollar of it is at public cost. If land grants should be suggested in reply to this, the ready answer is, that the public in all such cases, certainly in the case of the Illinois Central Railroad Company, protects itself against loss by reason of the grant, by doubling the price of the alternate sections not granted, and reserving certain privileges or advantages, which private citizens do not directly possess. Such reserved rights are a compensation for the benefits conferred by the grant. The government settles this account as between itself, or the public, and the railroad company, in the way indicated or otherwise, by the very conditions of the grant itself, and having done this, it is beggarly insolence to suggest that anything more than was stipulated for, is due to the public on that account. It would be like saying to the soldier, who had received from the government a grant of a homestead, that by reason of the grant and his acceptance of it, he was bound to sell his products at prices to be fixed by the legislature, although no such conditions were attached to the donation. Railroad companies, as to the property in use by them, as common carriers, stand on the independent basis of *private owners* in all respects. If this is not so, why is their property taxed, for its proportion of the public burdens? No one ever heard of a tax levied upon *public* property. This suggestion might, perhaps, have been more appropriately made in another connection; but it illustrates what I am now insisting upon, and that is, the unreasonableness of placing railroad companies, in respect to public control over the value and income of their business, upon the same basis with the *ancient* common carrier. Would it not be well to keep the indefinite phrases of the old law upon this subject,

within constitutional limits, and to construe them with some reference to the meaning, which they originally had, and the changes which have been wrought out since their adoption?

VII.

In the course of suggestions and argument upon the subject of the right of the State to interfere with what I am disposed to call "*vested rights*," by regulating the values of private property and the values of its uses, as applied to railroad companies, we are sometimes confronted with propositions like the following:

1st. The State has never bound itself, *by contract, that no law should be passed prescribing reasonable maximum rates* for the transportation of passengers and freights upon railroads.

2d. The affirmative declaration contained in some of the charters, that the corporations may fix their rates, does not imply a negative provision, that reasonable maximum rates shall not be fixed by law. The power of the company to fix rates, has annexed to it the implied condition that rates must be reasonable, and the power to determine what maximum rates are reasonable, is a proper legislative function, and such rates can be prescribed by law.

The first proposition is almost too indefinite to be tangible. It must be brought to a particular application in order that it may be appreciated. A floating generalization, will not serve in a special case. If it should be insisted upon here, it must be tested by the conditions of this case.

The charter of the Illinois Central Railroad Company *is a contract between the State and the company*, which cannot be changed without the consent of both parties. How much of it is a contract? Can the question be answered fairly and decently, otherwise than by saying, that it is a contract in its entirety? Is there any rule or guide for dismembering it, throwing one portion to one side and another portion to another side, of an indefinite line?

But the propositions themselves are not tenable, because they are not reasonable. Letting them down to their proper proportions, the first is, that when a State has made a grant, absolute on its face, which has been accepted and acted upon; it may revoke it, *because* it has not stipulated that it will not do so. Decisions of *this* court even, would find difficulty in making such a proposition appear respectable.

The second proposition is scarcely less open to censure and criticism in its application to this case, however it may fit the conditions of others. And, first, I say, that the very name, given by common consent, to the State legislation, under consideration, is a strong argument against its validity. It is a part of the "Granger Laws," which phrase has come to mean a sort of class legislation, favorable to one portion of the community and unfavorable to another portion. They are laws partial and discriminating in their character and results, and embarrassing in their operation upon the parties against whom they are directed. This quality of them antagonizes the provision, of the fourteenth amendment to the Federal Constitution, to which reference has already been made.

But the further and, possibly, the better argument against the second proposition, as above stated, in its application here, is, that the grant of power is absolute and

unconditional. "The board of directors shall have power "to establish such rates of toll for the conveyance of per- "sons and property upon the same (the railroad) *as* "*they shall from time to time, by their by-laws, direct and* "*determine*, and to levy and collect the same," etc.

Now, the proposition says, that the rates of toll must be reasonable, and that the very authority, viz., the State, which granted the power, may of itself determine what is reasonable. What has become of the power granted, if this dictum prevails? Mental reservations are not admissible to explain the meaning of words. Trusts and conditions must be defined in language and written, in order to be effectual; and it is straining the law to the point of breaking, to say that the most valuable grant which the company possesses—the one most essential to its success, if not to its very existence—is given in words, and at the same time, withheld by implication. It was not so understood.

But it is said, also, that the State cannot grant away any portion of its police power. This may, or may not, depend upon what is embraced within the meaning of the words. The State, in numerous instances, has, by contract, divested itself of the power of general taxation. The Illinois Central Railway Company's charter is an instance of this, and the power of taxation is as vital to government, if not more so, than the police power; for, without the power of taxation the police power and all other powers of government, as such, must fail for want of the means of support. The suggestion or argument is plausible, but it is defective in its application; and, again, I repeat that the police power, in the ordinary conditions of social life, does not concern itself with values, *directly*. If this is not true, then we are simply living under a government

of *police* powers. Constitutions are of no value. Political majorities may, under the *police power*, abolish courts established under *constitutional* provisions, recall all the grants of the State or destroy the advantages of them by unfriendly legislation. The court cannot sanction a doctrine leading to such results.

I might illustrate this position at much greater length, and the inclination to do so is very strong; but I am aware that there should be an end of discussion before a court. The importance of the principle involved, whether regarded as a constitutional question, or in its relations to the interests of the Illinois Central Railroad Company, and the interests of the public, which, as I believe, are directly opposed to the legislation here complained of, has seemed to require a reference to facts and theories not directly involved, perhaps, in the issues in the case, but, possibly, having an important bearing thereon. This must be my apology for so long an argument, which, notwithstanding its length, is still only a partial expression of the reasons, which require a reversal of the judgment of the Illinois Supreme court in the present case.

JNO. N. JEWETT,
Attorney for Plaintiff in Error.

APPENDIX.

1.

AN ACT to incorporate the Chicago and Vincennes R. R. Co. APPROVED Jan'y 17th, 1835.

(Laws of 1835. Page 88.)

SEC. 10. The said corporation is hereby authorized and empowered to regulate the time and manner in which goods, passengers and property shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and other buildings necessary for the accommodation of their concerns, and from time to time to fix, regulate, demand and receive the tolls and charges by them to be received for transportation of persons or property on the single or double railroad or ways aforesaid.

2.

AN ACT to incorporate the Jacksonville and Meredocia R. R. Co. APPROVED Feb. 5th, 1835.

(Laws of 1835. Page 197.)

SEC. 12. "The said corporation is hereby authorized and empowered to regulate the time and manner in which goods, passengers and property shall be transported, taken and carried on said railroad or trackway," etc. (Same as above.)

3.

AN ACT to incorporate the Belleville and Mississippi R. R. Co. APPROVED Dec'r 28th, 1835.

(Laws of 1835. Page 3.)

SEC. 6. [Substantially same as previous quotation.]

4.

AN ACT to incorporate the Pekin, Bloomington and Wabash R. R. Co. APPROVED Jan'y 16th, 1836.

(Laws of 1836. Page 8.)

SEC. 5. "A toll shall be, and is hereby granted and established, for the sole benefit of said company, upon all passengers and property of all descriptions which may be conveyed or transported upon said railroad, at such rate per mile as may be established and agreed upon from time to time, by the directors of said company; the transportation of persons and property, the construction of wheels, the forms of cars and carriages, the weight of loads and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations and provisions, as the directors from time to time prescribe and direct, and said road may be used by any persons who shall comply with such rules and regulations."

By section 14 the power was reserved by the State to purchase the road and franchises after thirty years from its completion, by paying the company the amount expended with ten per cent. interest per annum thereon, "and after such purchase, the limitation provided in the 5th section of this act shall cease and be of no effect."

5.

AN ACT to incorporate the Mississippi, Springfield and Carrollton R. R. Co. APPROVED Jan'y 16th, 1836.

(Laws of 1836. Page 12.)

Section 9 provides that the corporation "shall have power to regulate the time and manner for the transportation of goods and passengers on the said railroad

as well as the manner of collecting toll and dues on account of transportation and carriage, to erect and maintain toll-houses and all other buildings, for the accommodation of their concerns, and to collect tolls so soon as any part of said railroad shall be finished."

6.

AN ACT to incorporate the Alton, Wabash and Erie R. R. Co. APPROVED Jan'y 16th, 1836.

(Laws of 1836. Page 16.)

SEC. 5. [Same as No. 4, with the following exception.]

Provided, however, that if, at the expiration of ten (10) years from and after the completion of said road the net income or receipts for tolls and other profits, taking the ten (10) years aforesaid as the basis of calculation, shall have amounted to more than ten per cent. (10%) per annum upon the cost of the road, the legislature may take measure to alter and reduce the rates of toll and other profits in such manner as to take off the overplus for the next ten (10) years, calculating the amount of transportation upon the road to be the same as the ten (10) preceding years; and at the expiration of every ten (10) years thereafter the same proceedings may be had; *provided, further*, that the legislature shall not at any time so reduce the toll and other profits as to produce less than ten per cent. (10%) upon the cost of said railroad without the consent of said corporation.

7.

AN ACT to incorporate the Central Branch Wabash R. R. Co. Approved Jan'y 16th, 1836.

(Laws o. 1836. Page 21.)

Sec. 10. [Same as the preceding.]

Provided, however, that if the net income and receipts and other profits from and after the completion of said road shall exceed twelve per cent. (12%) per annum, the legislature may take measures to reduce such rates of tolls and other profits, so as to take off the overplus.

8.

AN ACT to incorporate the Galena, &c., R. R. Co.
Approved Jan'y 16th, 1836.

(Laws of 1836. Page 24.)

Sec. 6. The said corporation * * * * * * shall have power * * * * to prescribe * * * * * * the rates of toll for the transportation of persons or property thereon.

9.

AN ACT to incorporate the Wabash and Mississippi R. R. Co.
Approved Jan'y 15th, 1836.

(Laws of 1836. Page 36.)

Sec. 14. Said corporation * * * * * * shall have power to erect and maintain toll-houses and other buildings necessary for the accommodation of their concerns, and from time to time to fix, regulate, demand and receive the tolls and charges by them to be received for the transportation of property and persons on the single or double railroad or ways aforesaid.

10.

AN ACT to incorporate the Shawneetown and Alton R. R. Co. APPROVED Jan'y 18th, 1836.

(Laws of 1836. Page 46.)

SEC. 9. Provides that the corporation shall have power to regulate the time and manner in which goods and passengers shall be taken and transported, as well as the manner in which they shall collect all dues on account of transportations, provided the same shall not amount to more than twelve per cent. (12%) upon the capital stock paid in.

11.

AN ACT to incorporate the Mt. Carmel and Alton R. R. Co. APPROVED Jan'y 16th, 1836.

(Laws of 1836. Page 54.)

SEC. 14. The said corporation is hereby authorized * * * * * * from time to time to fix, regulate, demand and receive the tolls and charges to be by them received for the transportation of persons and property, and for the storage of merchandise and other property placed under their charge; *provided*, that the net tolls and charges, after deducting the amount of all costs and expenses in maintaining the said road and appendages, and a reasonable allowance for the wear and tear of the same, and of the carriages and cars used thereon, the wear and tear of bridges and buildings and their insurance against accidents by fire, and also all incidental charges of transportation, and officers and servants of the company, shall not exceed twelve per cent. (12%) per annum on the capital invested by the said corporation for any ten (10) years, taken together.

[Section 22 provides that at the expiration of thirty (30)

years from the completion of the road the legislature may cause an appraisement of the property to be made by six (6) persons, three (3) to be chosen by them, and three (3) by the company, and that the State shall have the privilege of taking the road and its appendages on payment to the company of its appraised value.]

12.

AN ACT to incorporate the Wabash and Mississippi Union R. R. Co. APPROVED Jan'y 18th, 1836.

(Laws of 1836. Page 64.)

SEC. 18. It shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive tolls and charges by them to be received for the transportation of property and persons on the single, double or treble railroad or way aforesaid.

13.

AN ACT to incorporate the Warsaw, Peoria and Wabash R. R. Co. APPROVED Jan'y 14th, 1836.

(Laws of 1836. Page 76.)

SEC. 9. [Substantially same as No. 5 above.]

14.

AN ACT to incorporate the Rushville R. R. Co. APPROVED Jan'y 16th, 1836.

(Laws of 1836. Page 85.)

SEC. 14. Said corporation * * * * * shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, as well as the manner in which they shall col-

lect the tolls, compensations and dues on account of transportation and carriage, and how the said railroad shall be used, provided that the net proceeds of the railroad as clear profits shall not exceed twenty per cent. (20%) per annum upon the cost of the same railroad, taking every expense in and about the same directly or indirectly expended.

15.

AN ACT to incorporate the Pekin and Fremont R. R. Co. APPROVED Jan'y. 13th, 1836.

(Laws of 1836. Page 90.)

SEC. 6. [Substantially same as in No 1.]

16.

AN ACT to incorporate the Illinois Central R. R. Co. APPROVED Jan'y. 16th, 1836.

(Laws of 1836. Page 129.)

[Authorizes the company to construct a railroad from the mouth of the Ohio river, north to a point on the Illinois river, at or near the termination of the Illinois and Michigan Canal.]

SEC. 5. A toll is hereby granted and established for the sole benefit of said company upon all passengers and property of all descriptions which may be conveyed and transported upon said road at such rates per mile as may be agreed upon and established from time to time by the directors of said company. The transportation of persons and property, the construction of wheels, the forms of cars and carriages, the weight of loads, and all other matters and things in relation to the use of said road, shall be in conformity to such rules, regulations and provisions as the

directors shall from time to prescribe and direct; *provided*, however, that if, at the expiration of ten (10) years from and after the completion of said road, the net income or receipts from tolls, taking the ten (10) years aforesaid as the basis of calculation, shall have amounted to more than twelve per cent. (12%) per annum upon the cost of the road, the legislature may take measures to alter and reduce the rate of tolls in such manner as to take off the overplus for the next ten (10) years, calculating the amount of transportation upon the road to be the same as the ten (10) preceding years, and at the expiration of every ten (10) years thereafter the same proceedings may be had; *provided, further*, that the legislature shall not, at any time, so reduce the tolls as to produce less than twelve per cent. (12%) upon the cost of said railroad without the consent of the said company. And no other railroad than the one hereby granted shall, within fifty (50) years from the passage of this act, be authorized to be made, leading from the Ohio river, or the Mississippi river, commencing below the mouth of the Illinois river, to any place within ten (10) miles of the northerly termination of the railroad hereby established; *provided*, that the said railroad shall be commenced in five (5) years, and completed within twenty (20) years from the passage of this act.

[Section 12 provides that the legislature may, at any time after the expiration of twenty-five (25) years from the opening of the road, purchase the railroad and its franchises by paying the company the amount expended in making said railroad; and in case, at the time of purchasing, the company shall not have received a net increase equal to twelve per cent. (12%) per annum on the said expenditures from the time of the payment thereof by the

stockholders, by paying the company such additional sum as, together with the tolls which they shall have received from the said railroad, will be equal to a net profit of twelve per cent. (12%) per annum on the cost of said railroad from the date of the payment thereof by the stockholders of the said corporation to the time of such purchase.]

Section 13 authorizes the company to extend the railroad from the Illinois river to Galena, "provided the route "shall be surveyed and located within four (4) years from "July next (1836), and the whole railroad completed within "the time limited in the fifth (5th) section of this act."

17.

AN ACT to provide for the construction of a railroad from LaSalle to Dixon. APPROVED Feb'y 27th, 1841.

(Laws of 1841. Page 199.)

SEC. 13. It shall be lawful for the company hereby incorporated, from time to time, to fix, regulate and recover the tolls and charges to be by them received for transportation of property and persons on the railroad aforesaid.

18.

AN ACT to incorporate the Great Western R. R. Co. APPROVED Mch. 6th, 1843.

(Laws of 1843. Page 199.)

SEC. 5. A toll is hereby granted and established for the sole benefit of said company upon all passengers and property of every description, which may be carried or transported upon said railroad, at such rates per mile as may be agreed upon and established from time to time by the directors of said company.

19.

AN ACT to incorporate the Sangamon and Morgan R. R. Co. APPROVED Mch. 1st, 1845.

(Laws of 1845. Page 150.)

SEC. 11. The board of directors shall have power to fix and regulate the rate of pay for transportation or conveyance upon said road.

[Section 8 provides for the purchase by the company of all the right and title of the State to that part of the Northern Cross Railroad lying between Springfield and the Illinois River.

Section 18 reserves the right of the State to resume the ownership of said railroad after the expiration of twenty-five (25) years, on paying the cost of the road and of putting the same in repair, with six per cent. (6%) interest.]

20.

AN ACT to incorporate the Rock Island and LaSalle R. R. Co. APPROVED Feb'y 27th, 1847.

(Private Laws of 1847. Page 139.)

SEC. 2. The said corporation * * * * * may prescribe the rates of toll on the transportation of persons and property thereon.

21.

AN ACT to construct a railroad from Alton, in Madison Co., to Springfield, in Sangamon Co. APPROVED Feb'y 27th, 1847.

(Private Laws of 1847. Page 144.)

SEC. 8. Said corporation * * * * * may fix, establish, take and receive such rates of toll for all passengers and property transported upon the same, as the said directors shall from time to time establish.

22.

AN ACT granting a charter to the St. Charles Branch R. R. Co. APPROVED Jan'y 31st, 1849.

(Private Laws of 1849. Page 78.)

SEC. 6. The said corporation * * * * shall have power * * * * to prescribe * * * * the rate of toll for transportation of persons or property thereon, *as may be deemed to be suitable to their interest.*

23.

AN ACT to incorporate the Northern Cross R. R. Co. APPROVED Feb'y 10th, 1849.

(Private Laws of 1849. Page 82.)

SEC. 6. [Confers upon the company all the rights, powers and privileges conferred upon the "A. and S. R. R. Co." by the act incorporating the same, approved Feb'y 27, 1847. (See No. 21, ante.)]

24.

AN ACT to amend an act entitled an act to incorporate the Nauvoo and Warsaw R. R. Co. APPROVED Feb'y 10th, 1849.

(Private Laws of 1849. Page 85.)

SEC. 3. [Confers same powers as the preceding.]

25.

AN ACT to incorporate the Belleville and Illinoistown R. R. Co. APPROVED Feb'y 12th, 1849.

(Private Laws of 1849. Page 93.)

SEC. 6. Said corporation * * * * shall have power * * * * * * from time to time to fix, regulate, demand and receive the tolls and charges by them to be received for transportation of persons or property on said railroad.

26.

AN ACT granting a charter to the Aurora Branch R. R. Co. APPROVED Feb'y 12th, 1849.

(Private Laws of 1849. Page 96.)

SEC. 6. The said corporation * * * shall have power * * * * to prescribe * * * * the rates of toll for transportation of persons or property thereon, *as may be deemed suitable to their interests.*

27.

AN ACT to incorporate the Peoria and Oquawka R. R. Co. APPROVED Feb'y 12th, 1849.

(Private Laws of 1849. Page 99.)

SEC. 2. Said corporation shall have the right * * * * to regulate * * * * the rates of toll on the transportation of persons or property thereon.

[The next act was the act to incorporate the Illinois Central R. R. Co., approved Feb'y 10th, 1851, the provisions of which are set out in the foregoing argument. Several acts were afterwards passed at the same session, incorporating other railroad companies, all of which contained an express power to regulate the rates of toll for the transportation of passengers and property thereon. See Private Laws of 1851, pages 63, 93, 97, 175, 196, 255, 266.]

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JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States,

October Term, A. D. 1882.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
THE PEOPLE, &c.

Error to the Supreme Court of Illinois.

Supplemental Brief for Plaintiff in Error.

Jno. N. Jewett,
Att'y for Plaintiff in Error.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH ST., CHICAGO.

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I.

The transposition of the language of the eighth section of Illinois Central Railroad Company's charter, for the purposes of construction, suggested by counsel for the state, is inadmissible. The change in the language itself is even more objectionable. Both modifications are an attempt to make the legislature say something, which was never said and never intended to be said. The unfairness and impropriety of the change may be illustrated by an attempt to transfer the *proviso* to the end of the section. This cannot be done without a complete confusion of the idea evidently

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intended to be conveyed. It would be absurd to suggest, that a rule or regulation, made *in pursuance of a power* contained in an act, could be repugnant to that act. Besides, if the legislature intended that the *proviso* should qualify the entire section, such an intention would have received better and more appropriate expression. It ought to be presumed, that the law-making power understood its own purposes and formulated them in words. It ought also to be assumed, that the same power had knowledge of the general effect of *provisos* when incorporated into its enactments. Their effect, as already stated, is to limit or qualify what precedes them in immediate connection. The following authorities, in addition to former citations, sustain this position:

Spring et al. v. *Collector of Olney*, 78 Ill., 101.
Treasurer of Vt. v. *Clark*, 19 Vt., 131.
Rex v. *Taunton*, 17 Eng. C. L., 370.
Huydekoper v. *Burrus*, 1 Wash. C. C., 119.

If permission is given to transpose the words of the 8th Section of the Illinois Central Railroad Company's charter, almost any proposition could be made out of them, and if authority be granted to substitute for the words actually used, a few others to suit individual purposes, it would be easy to absorb the whole property of the company, as well as all administrative functions having relation to it.

The office of by-laws, *properly so-called*, is well understood. They are for internal regulation, and in the case of corporations, simply fix the relations of the corporations, their members, officers and agents, as between themselves. They do not affect the public, and it is not pretended that the public, outside of the corporation, are in-

fluenced or controlled by them. It is upon this basis, and none other, that counsel for the state agree, that the first part of Section 8 of the charter of the Illinois Central Railroad Company, including the *proviso*, may be omitted without detriment to the right of the company to make *by-laws*. A broad illustration of what I wish to be understood, as attempting to suggest, may be stated in this wise: Suppose the Illinois Central Railroad Company should enact a by-law, providing that any officer or agent of the company, who failed to be at his post at seven o'clock in the morning, should be fined $100 and imprisoned in the county jail for six months. Other illustrations on the same line readily suggest themselves. The subject is clearly within the scope of by-laws, and the *actual requirements* may be within the powers of the corporation, but the penalties cannot be enforced, because they are not recognized by, and are inconsistent with, the constitution and laws of the United States, and of the State of Illinois, and no such power of punishment has been, or can be, granted to the corporation.

The power to make by-laws, as such, is not a corporate power. It does not depend upon a grant from the sovereign authority. It attaches itself, as an incident to organizations, corporate or otherwise, for business purposes. They may be simply the rules by which a man governs his own private affairs as between himself and those associated with him in any capacity, having relation to those affairs. In this sense the word "by-law" was used in the first part of section 8 of the Illinois Central Railroad Company's charter, including the *proviso*. The latter part of the same section has reference to an entirely different subject. It is a grant of a *distinctive and well defined power*, which concerns the dealings between the

corporation and the people outside of it, and although the word " by-law " is repeated, it must be so interpreted as to harmonize with the subject matter of the grant and the further words employed in connection therewith. The distinction is neither fanciful nor strained; but it is inconsistent, I admit, with the statement of the counsel for the state, at page 9 of their argnment. I quote it, *with a simple denial of its correctness.* They say: " Section 8 " of the charter authorizes *the company* to fix its rates of " toll in its 'by-laws'; and the proviso, in express terms, " requires all by-laws, rules and regulations made by the " company, to carry into effect any of the provisions of " this act, to be not repugnant to the constitution and laws " of the United States, or of the State, or repugnant to " this act."

II.

I am willing, for the purposes of this case, to adopt the doctrine of the case of *Stone* v. *Mississippi*, 101 U. S., 814. The case itself bears no analogy to the present one, either in its facts or the principles underlying it. Whilst the whole case is instructive in its discriminations, I quote from it only a few words evidencing this discrimination. The chief justice says (page 820): " The contracts, which " the constitution protects, are those that relate to property " rights, not governmental."

I cannot find reasonable grounds for the proposition of counsel for the State, contained on page 11 of their brief, which is as follows:

" While a state legislature may legislate, as well as make " contracts, in reference to the grant of corporate fran-

"chises, its power to make contracts of this nature is no "greater than was the prerogative of the king."

The proposition is not justified by an intelligent understanding of the difference between governmental conditions in Great Britain and in this country. In the Kingdom of Great Britain, a grant by the king alone, in virtue of his royal prerogative, is one thing; an act of parliament, in which the three estates concur, is quite a different thing. The effect of the former is abridged by concessions of the crown and may be restricted in its authority. The latter is the *supreme law of the land. Parliament is omnipotent.* In this country legislation would be supreme, *except for written constitutions, limiting its powers*, and those limitations constitute a *radical* and important change in the *substance* of government. Constitutions with us, are the first and paramount laws, *otherwise they are nothing.*

The common law, *as such*, is no obstacle to *any kind of legislation.* It is only when common law rights are fixed by constitutional provisions, as understood in this country, that they are made permanent and placed beyond the reach of legislative control. Any common law right, not thus protected, is subject to changes by legislation. It is constitutions, that protect, or should protect, *vested* rights, under our theory of government. If this fail, there is no protection for them.

On page 13 of the brief is the following:

"Extortion is a crime at *common law.* It may be com- "mitted, not only by public officers, but by any one who "pursues a *public employment* and sustains such relations "to the public, that *the people must, without great incon-* "*venience, necessarily* deal with him."

"Railroad companies entrusted with the control and

"management of *the public highways* which the people "must *of necessity* use, *may be guilty of extortion in a* "*legal sense.*"

"The individual citizen and the railroad companies do "not stand upon terms of equality in making contracts as "to rates to be paid for transportation. *The corporation* "*possesses every facility for the practice of extortion.*"

"*Railroads are pulic highways*, and the *sovereign* "power of taxation and eminent domain may be brought "into exercise to aid in their construction."

"While railroad companies are not public corporations "in the same sense as a county or city, neither are they "*private* corporations in the same sense as mining or manu- "facturing companies. They have been very properly "designated *quasi* public corporations."

If I could feel myself at liberty to weary the court with an analysis of these several propositions, in their relation to the pending case and their application to the plaintiff in error under its charter, the constitution of the State of Illinois and the constitution of the United States, I should certainly avail myself of this opportunity. The constitutional questions, submitted, *underlie all of these propositions*, which I cannot characterize otherwise than as *floating*, *communistic* generalizations, pointing to a usurpation of legislative control over the vested rights of the individual citizen.

Extortion is a crime, and may be punished. Railroad companies may be guilty of extortion; but, conceding both of these proposition, there is still no foundation laid for a judicial determination that a railroad company has been guilty of extortion, because its board of directors, under authority granted in its charter, which is a *contract*, has

charged twenty-eight dollars and thirty-five cents for transporting seventy barrels of salt from Chicago to Tuscola, when somebody else has simply expressed an opinion that the charge should only be twenty-four dollars and eighty cents. What is extortion is a judicial question, to be determined in a judicial way and by judicial means. The punishment for the offense may be fixed by legislation. It may belong to legislation to define the crime, in *general terms*, applicable everywhere and to every citizen; but it is respectfully submitted, that legislation, under our constitutions, can go no further.

P., B. & W. R. R. Co. v. *Bowers*, 4 Houston's Del. Rep'ts, 506, 539.

In these propositions, the provisions of the charter, as a contract, are also ignored. In the case of *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray, 339, at page 348, the court says: "Upon familiar and well set-"tled principles, the act, when accepted by the defendants, "was an executed contract between them and the govern-"ment, by the terms of which, as contained in the char-"ter, both parties are equally bound. The defendant "cannot, without the consent of the legislature, escape or "evade any of the duties or obligations imposed upon or "assumed by them under the act; *nor can the legislature*, "*without the assent of the defendants, in any way affect or* "*impair* the original terms of the charter, by annexing "new conditions or imposing additional duties, onerous in "their nature, or inconsistent with a reasonable construc-"tion of the compact." The case of *Boston & Lowell R. R. Co.* v. *Salem & Lowell R. R. Co.*, 2 Gray, 30, and other cases are referred to.

The charter of the New Bedford Bridge Company provided, that the draw should be "at least thirty feet

"wide," and "suitable" in other respects, and the same argument was made upon this language of the charter, which is here presented by the counsel for the defendants in error, viz, that there was a reserved authority in the state to determine what was "suitable," etc. In reply to this argument the court, at page 350, say:

"But we cannot yield to the force of this argument. *It* "*is founded upon an entire misapprehension of the relation* "*of the parties, as created by the act of incorporation.* "THEY ARE BUT PARTIES TO A CONTRACT. Each has "equal rights and privileges under it, and *neither can* "*interpret its terms authoritatively, so as to control and* "*bind the rights of the other. The commonwealth has no* "*more power or authority to construe the charter than the* "*corporation.* By becoming a party to a contract with "its citizens, the government divests itself of its soverignty "with respect to the terms and condition of the compact, "and its construction and interpretation, *and stands in* the "same position as a private individual. If it were other- "wise, the rights of parties, contracting with the govern- "ment, would be held at the caprice of the sovereign, and "exposed to all the risks arising from the *corrupt or ill-* "*judged use of misguided power.* THE INTERPRETATION "AND CONSTRUCTION OF CONTRACTS, WHERE DRAWN IN "QUESTION between the parties, *belongs exclusively to* "*the judicial department of the government.* The legis- "lature has no more power to construe their own con- "tracts with their citizens, than those which individuals "make with each other. They can do neither without "exercising *judicial power*, which would be contrary to "the elementary principles of our government, as set "forth in the declaration of rights," etc.

In applying this doctrine, so clearly and forcibly stated,

I have only this to say, that, even if the grant of power to fix rates, conferred by the eighth section of the Illinois Central Railroad Company's charter, is burdened with the *reserved* condition, that those rates shall be reasonable, still the state, as one party to the contract *has no power to determine the question of reasonableness.* This is a question for the judicial department of the government, and cannot be settled by legislation. The court further on say:

"If the legislature have the power to decide upon the "true meaning of the terms of the contract and to deter- "mine what shall be deemed suitable in the construction "of the bridge and draws, *there can be no limit* placed "upon the exercise of this power. If they have the right "to prescribe a draw sixty feet in width, they may, here- "after, require the defendants to extend it to one hundred "feet, or to build it across the entire space between the "shore and the adjacent island. * * * * In a word, "the argument leads directly to the conclusion, that the "legislature have the power to annex new and onerous "conditions to the contract, *at their pleasure*, and thus "effectually destroy the franchises granted to the defend- "ants. *Such a doctrine cannot* be maintained, without "overthrowing all the salutary and well established prin- "ciples applicable to this species of contract between the "government and its citizens."

But the argument is made in the brief of counsel for the defendant in error, that the state cannot divest itself of the power to punish offenses against the public welfare; that *extortion* is a crime or misdemeanor, at common law, and that to provide punishments for it is simply an exercise of legislative jurisdiction. To the proposition, as thus stated, I make no objection. The claim, in order

to be of any avail in this case, must go further, and it is to this extension that I object. The pretense is that the legislature may fix the boundary of *reasonableness*, no regard being paid, of course, to costs and expenses of service. The legislative act is *arbitrary*. Although the word "reasonable" should be used in the enactment, the provision still means nothing but a legislative *determination* as to what is reasonable, and legislation represents only one side of the contract, whilst the question is purely and specially *judicial*, and the attempt to absorb it by legislation, is manifestly *usurpation*. The case cited contains a plain statement of this proposition.

It would be hardly possible to suggest a stronger individual case calling for legislative relief, if practicable, than is shown in the New Bedford Bridge case; but the court held the legislative power, inexorably bound by the terms of the contract it had made. I wish to suggest a fact, pertinent here, of which the court, I assume, may take judicial notice. The report of the railroad and warehouse commissioners of Illinois, for the year 1881, states, that the average rate of fare for the transportation of passengers over the line of its railroad, charged and collected by the Illinois Central Railroal Company, was two and five one-hundredths ($2\frac{5}{100}$) cents per mile, and the average charge for freight was one and forty-five one-hundredts (1.45) cents per ton per mile. Passenger rates for the Illinois Central railroad, as fixed by the schedules of the railroad and warehouse commissioners, were three cents per mile, and whilst I cannot state it definitely, I am sure, that the maximun of commissioners' rates for freight was largely in excess of the average charge above stated. The act of 1873 evidently did not occasion this result.

As applicable to the several propositions above quoted

from the brief of counsel, I also call the attention of the court to the case of *State Bank of Ohio* v. *Knoop*, 16 Howard, 376, which of itself would seem to furnish a sufficient answer to them.

As evidence of the valuable consideration already paid to the State, and which it is still under obligations to pay, for the "*grants, privileges and franchises*" conferred by its charter, I submit herewith two statements, compiled from public records, of which the court will take judicial notice. The *first* shows the amount actually paid by the company into the treasury of Illinois as the percentage on its gross earnings, which is an exaction of the State under the company's charter, *for each year*, from the year 1856 to the year 1881, both inclusive. The *second* is a comparative statement of the earnings, *rate* and amount of taxation, miles of road and amount of taxes per mile, between the Illinois Central Railroad Company and the Chicago, Burlington and Quincy Railroad Company, for the years 1879, 1880 and 1881. The latter statement also shows the same items respecting the Chicago, Rock Island and Pacific Railroad Company for the years 1880 and 1881. The last two companies are subject to general taxation under the law, of the State.

There is one other suggestion contained in the brief of opposing counsel which I cannot refrain from calling attention to. The general proposition (the III of the brief) has already been considered. At page 15 they say: "The reasoning in the Dartmouth College case clearly "excludes the idea that a State Legislature may enter into "an obligatory contract, that no law shall be passed for the "government of property, *taken under the sovereign au-* "*thority of the State, for public use.*

"In the opinion of Chief Justice Marshall (4 Wheat.,

"634), the following question is propounded: Are the "trustees and professors, public offices, invested with any "portion of political power, partaking in any degree in the "administration of civil government and performing du- "ties which flow from sovereign authority?

"In that case this question, in all its branches, could "properly be answered in the negative. *It is otherwise "here.* In this case the function performed is that of the "State. *Olcott* v. *Supervisors*, *supra*."

The case referred to is a fair illustration of the dangerous element lurking in a certain class of judicial opinions, *vulgarly* but *professionally* designated as "*slopping over*." I believe I am well advised that the language of the opinion in the case of *Alcott* v. *Supervisors*, *etc.*, was criticised as liable to misinterpretation, by some of the judges of this court, who assented to the conclusions of the opinion itself; but, if I am mistaken in this, I can safely call attention to the facts of that case, which should and must furnish the basis of the judgment rendered, and say of them, that they furnished no occasion for the use of the few words extracted from it, and presented as of such importance in the brief of the learned counsel. The taxing power may be exercised by municipitalities, *under legistative authority*, for *any purpose of general interest to the municipality*. It is not limited to railroads, turnpikes or canals, or the industries in which the common advantage is directly or indirectly concerned. The securing of private enterprises, locally beneficial, or presumable so, such as manufacturing establishments, were once deemed of sufficient public interest to justify local taxation under legislative authority, and even if no cases of the exercise of such authority, could be found, I should feel quite safe in asking for the production of convincing reasons against it.

What is beneficial to the public, in the absence of constitutional prohibition, may be secured at the public expense, and by the exercise of a public authority, and when the public interested, is not itself the owner, the incidental benefit to the public supports and justifies the exercise of the public authority. But the question of Chief Justice Marshall in the Dartmouth College case, as to whether the "Trustees and professors" of Dartmouth College were "public officers, invested with any portion of political "power, partaking in any degree in the administration of "civil government, and performing duties which flow "from sovereign authority?" it is said, could, in that case, be answered negatively, whilst in the present case, it cannot be so answered. I submit to this court, with much confidence, that the education of the people of this country, is as much a matter of national and state concern, as the tariff of charges on seventy barrels of salt, transported from Chicago to Tuscola by the Illinois Central Railroad Company, or any interest, which the state may, or can have, in the fixing of rates for the transportation of passengers and property upon the railroads within its borders—and whether the latter may not as well be surrendered by contract in a particular case as the former.

JNO. N. JEWETT,
Atty. for Plff. in Error.

STATEMENT I.

Illinois Central Proper—Charter Tax.

YEAR.	GROSS EARNINGS.	RATE OF TAX.	AMOUNT OF TAX PAID STATE OF ILLINOIS.
To Jan. 1, 1856	$595,031 86	5 %	$29,751 59
1856	1,552,633 32	5 %	77,631 66
1857	279,012 05	5 %	145,645 84
1857	1,881,360 64	7 %	
1858	1,885,793 34	7 %	132,005 53
1859	1,887,206 77	7 %	132,104 46
1860	2,536,531 67	7 %	177,557 22
1861	2,532,254 55	7 %	177,257 81
1862	3,031,065 79	7 %	212,174 60
1863	4,291,351 09	7 %	300,394 58
1864	5,793,057 71	7 %	405,514 04
1865	7,092,711 94	7 %	496,489 84
1866	6,101,082 18	7 %	427,075 75
1867	6,342,967 56	7 %	444,007 74
1868	6,119,964 06	7 %	428,397 48
1869	6,641,904 47	7 %	464,933 31
1870	6,626,921 66	7 %	464,584 52
1871	6,621,613 05	7 %	463,512 91
1872	6,326,522 11	7 %	442,856 54
1873	6,122,485 76	7 %	428,574 00
1874	5,633,806 56	7 %	394,366 46
1875	5,368,086 02	7 %	375,766 03
1876	5,085,794 14	7 %	356,005 58
1877	4,519,313 42	7 %	316,351 94
1878	4,577,595 80	7 %	320,431 71
1879	4,649,676 96	7 %	325,477 38
1880	5,262,123 73	7 %	368,348 66
1881	5,494,035 95	7 %	384,582 52
			$8,691,799 70

STATEMENT 2.

I. C. R. R. Co.

	Earnings.	Taxes.		Miles of Road.	Taxes per Mile.
		Rate.	Amount.		
1879	$4,649,676 96	7%	$325,477 38	705.5	$461 35
1880	5,262,123 73	"	368,348 66	"	522 11
1881	5,494,035 95	"	384,582 52	"	543 71

C., B. & Q. R. R. Co.

	Earnings.	Taxes.		Miles of Road.	Taxes per Mile.
		Rate.	Amount.		
1879	$8,268,195 71	2.28	$189,093 80	838.14	$225 61
1880	9,374,969 00	2.10	197,113 70	838.49	235 08
1881	9,519,993 97	2.22	211,444 06	826.92	255 70

C., R. I. & P. R. R. Co.

	Earnings.	Taxes.		Miles of Road.	Taxes per Mile.
		Rate.	Amount.		
1880	$3,518,129 15	2.75	$96,712 99	236.43	$409 06
1881	3,670,192 16	2.37	86,944 71	236.43	367 74

108-541

OFFICE SUPREME COURT U. S.
FILED
FEB 27 1883
JAMES H. McKENNEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1882.

No. 241.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JAMES K. EDSALL & JOHN B. HAWLEY,
COUNSEL FOR DEFENDANT IN ERROR,

CHICAGO:
THORP, WEST & CO., LEGAL PRINTERS, 111 MADISON STREET.
1883.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1882.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

Error to the Supreme Court of Illinois.

STATEMENT OF THE CASE.

This was an action of debt, instituted in the name of the People of the State of Illinois, in the Circuit Court of Douglas county in that State, against the Illinois Central Railroad Company, under the statute of Illinois passed May 2, 1873, to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight.

Rev. Stat. of Ill. of 1874, p. 816.

The declaration contained thirty-one counts, each for a distinct act of alleged extortion or unjust discrimination, the seventeenth count being as follows:

"And whereas, also, the said defendant heretofore, to-wit: on the 30th day of March, A. D. 1874, to-wit: at the

county of Douglas, aforesaid, was a railroad corporation, and then and there owning and operating a certain railroad, lying wholly within said State of Illinois, and running from said town of Tuscola, in said county of Douglas, to Chicago, in the county of Cook, in the State of Illinois, aforesaid, and then and there doing business as a common carrier upon and over said line of railroad, and that afterwards, to-wit: on the day and year last aforesaid, at the county of Douglas, aforesaid, the said defendant, as such common carrier, at the special instance and request of John M. Maris, carried and transported for said John M. Maris, from Chicago aforesaid to Tuscola aforesaid, upon and over said railroad, certain other goods, wares and merchandise, to-wit: seventy barrels of salt, of a certain weight, to-wit: of the weight in all of twenty thousand pounds, of the goods and chattels of said John M. Maris, then and there being, and that said defendant afterwards, to-wit: on the day and year last aforesaid, at the county of Douglas aforesaid, charged, collected, demanded and received of and from said John M. Maris, as and for said defendant's toll and compensation for the said carriage and transportation of said last mentioned goods, wares and merchandise, upon and over said railroad, from said Chicago to said Tuscola, in manner aforesaid, a large sum of money, to-wit: the sum of twenty-eight dollars and thirty-five cents, and that said mentioned sum of money so charged, collected, demanded and received by said defendant, of and from said John M. Maris, for the carriage and transportation of said last mentioned goods, wares and merchandise, as aforesaid, then and there exceeded a fair and reasonable rate of toll and compensation for the carrying and transportation thereof in manner aforesaid, in a large sum of money, to-wit: in the sum of three dollars and fifty-five cents, and was then and there unjust, unfair, unreasonable and extortionate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said People of the State of Illinois, and thereby, and by force of said statute, an action has accrued to the said Peo-

ple of the State of Illinois to demand and have of and from the said defendant the sum of five thousand dollars, other parcel of the said sum above demanded."

The defendant filed no plea, but the cause was submitted to the Circuit Court, for decision, upon the following

STIPULATION:

"It is agreed between the parties to this suit, that it be submitted to the court for trial without the intervention of a jury, and, upon the part of the defendant, it is admitted—

"1st—That the defendant charged and collected of the person named in the 17th count of plaintiff's declaration, twenty-eight dollars and thirty-five cents, for the transportation of seventy barrels of salt from the city of Chicago, Illinois, to Tuscola in Douglas county, Illinois, as alleged in said 17th count.

"2d—That the maximum amount, fixed for the transportation of freight of like class and quantity, by the Rail road and Warehouse Commissioners of the State of Illinois, was, before and at the time of such transportation, twenty-four dollars and eighty cents, as established by a schedule of rates for the defendant made, subscribed and published, by said Commissioners, and a table entitled 'Classification of Freight,' which schedule of rates and tables of the 'Classification of Freight,' were made by said Commissioners, and were in force before the transportation of said salt, mentioned in said count, and were made and published in pursuance of an act of the General Assembly of the State of Illinois, approved May 2, A. D. 1873, and in force July 1, 1873, and entitled 'An act to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight on railroads in this State,' etc., and this admission shall have the like force and effect as if said schedule of rates and tables for the 'Classification of Freight,' had been read in evidence on the trial.

"3d—That the sum so charged by the defendant for such transportation in said 17th count mentioned, exceeds

the rate as previously fixed by said Commissioners in the sum of three dollars and fifty-five cents.

"4th—It is admitted by the plaintiff and defendant, as follows: that said Commissioners, in pursuance of the statute, have classified the different railroad companies of the State, and have established rates differing according to the classifications thus made, and in so making such classifications, the rates established for defendant differ materially from the rates so fixed for some of the other railroads of this State.

"5th—That said sum as charged and collected by the defendant was the rate of toll previously directed and determined by a by-law of the Board of Directors of said defendant, in conformity with the provisions of its charter, and so continued to be the rate so established up to and at the time of said shipment.

"6th—The printed charter of defendant, attached hereto, marked A, approved February 10, 1851, being an act passed by the General Assembly of the State of Illinois, entitled 'An act to incorporate the Illinois Central Railroad Company,' is admitted as evidence in this case.

"7th—The defendant claims the right to direct and determine its rates of toll for the transportation of freight and passengers, by virtue of the provisions of its charter, and insists that the act of the General Assembly of the State of Illinois, approved May 2, 1873, entitled 'An act to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight on railroads in this State, and to punish the same, and prescribe a mode of procedure, and rules of evidence in relation thereto, and to repeal an act entitled "An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in the State for the transportation of freights on said roads, approved April 7, 1871,"' in so far as it conflicts with the right of the defendant to direct and determine its rates of toll for the transportation of freight and passengers, is in conflict with its charter, and the Constitution of the State of Illinois, and is repugnant to the Con-

stitution of the United States, in this, that it impairs the obligation of said contract entered into between the defendant and the State of Illinois, and is unconstitutional and void.

"8th—On the part of the plaintiff, it is insisted that said recited act is constitutional and valid.

"If, upon the foregoing facts, this court finds for the plaintiff, it is agreed that a fine of $1,000 may be assessed by the court; should the court find for the defendant, the judgment is to be entered accordingly.

"Either party may appeal from the decision, finding and judgment of the court."

There was appended to the stipulation, the charter or act of incorporation of the Company, the 8th section of which contains the following:

"The said company shall have power to make, ordain and establish *all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act*, and for the well-ordering, regulating and securing the affairs, business and interests of the company: *Provided*, that the same be not repugnant to the constitution and laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall, from time to time, *by their by-laws direct and determine*, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such *rules* and *regulations* as said board of directors shall from time to time determine."

Private Laws of Ill. of 1851, p. 63.

Printed Record, p. 30, § 8.

The statute of Illinois of May 2, 1873, to prevent extortion and unjust discrimination in the transportation of passengers and freight, etc., under which the suit was prosecuted, contains among other provisions, the following:

"§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* If any railroad corporation, organized or doing business in this State under any act of incorporation, or general law of this State, now in force or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation, for the transportation of passengers or freight, of any description, or for the use and transportation of any railroad car upon its track, or any of the branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereinafter provided." * *

"§ 4. Any such railroad corporation guilty of extortion, or of making any unjust discriminations as to passenger or freight rates, or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights, shall, upon conviction thereof, be fined in any sum not less than one thousand dollars ($1,000), nor more than five thousand dollars ($5,000), for the first offense; and for the second offense not less than five thousand dollars ($5,000), nor more than ten thousand dollars ($10,000), and for the third offense not less than ten thousand dollars ($10,000), nor more than twenty thousand dollars ($20,000); and for every subsequent offense and conviction thereof, shall be liable to a fine of twenty-five thousand dollars ($25,000)." * * * * * *

"§ 8. The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this State, as soon as practica-

ble, a schedule of reasonable maximum rates of charges for the transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in all suits brought against any such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freights and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules. When any schedules shall have been made or revised, as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for three successive weeks, in some public newspaper published in the city of Springfield, in this State. All such schedules, heretofore or hereafter made, purporting to be printed and published as aforesaid, shall be received and held in all such suits as *prima facie* the schedules of said commissioners, without further proof than the production of the schedule desired to be used as evidence, with a certificate of the railroad and warehouse commissioners that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named, and that the same has been published as required by law, stating the name of the paper in which the same was published, together with the date of such publication."

Rev. Stat. of Ill. of 1874, Chap. 114, pp. 816-819.

The Circuit Court held the act of May 2, 1873, to be constitutional and valid, and therefore, in pursuance of the stipulation, assessed a fine of $1,000 against the defendant, for which judgment was rendered. The defendant thereupon appealed to the Supreme Court of the State, where the judgment of the Circuit Court was affirmed.

Illinois Central R. R. Co. v. *The People*, 95 Ill., 313.

The Railroad Company has brought the record here on writ of error to the Supreme Court of the State, and thereupon seeks to review and reverse the judgment of that court, upon the ground, as claimed, that the State had, by contract contained in the act of incorporation, conferred upon the company the right to establish and collect such rates of toll for the transportation of persons and property upon the road as it might see fit, whether reasonable or extortionate; and that this contract was impaired by the act of May 2, 1873, to prevent extortion and unjust discrimination in the transportation of passengers and freight upon railroads.

BRIEF FOR THE STATE.

I.

The State has never bound itself by contract that no law shall be passed prescribing reasonable maximum rates of toll for the transportation of passengers and freight upon this railroad.

1. Grants of corporate privileges and franchises are construed most strongly against the corporation. Nothing can be taken against the State except that which is granted in clear and unmistakable terms. Any doubt as to the proper construction is fatal to the claim made by the corporation.

Fertilizing Company v. *Hyde Park*, 97 U. S., 666.

The Del. Railroad Tax, 18 Wall., pp. 206, 225.

Chas. Riv. Bridge v. *Warren Bridge*, 11 Pet., 420, 546.

Providence Bank v. *Billings*, 4 Pet., p. 548.

United States v. *Arredondo*, 6 Pet., p. 738.

Camden & Amboy R. R. Co. v. *Briggs*, 2 Zab., p. 623

Sedgewick's Stat. and Const. Law, p. 595.

Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How, 416,435.

2. Section 8 of the charter authorizes the company to fix its rates of toll in its "by-laws"; and the proviso to the same section, in express terms, requires all by-laws, rules and regulations made by the company to carry into effect any of the provisions of the act, to "be not repugnant to the Constitution and laws of the United States, or of this State, or repugnant to this act."

United States v. *Babbitt*, 1 Black, 55, 61.
Mayor of Cumberland v. *McGender*, 34 Md., 381.
Perrine v. *Del. & Chesapeake Canal Co.*, 9 How, 172.
Coke's Inst., Part 2, Vol. 4, p. 220.

3. The requirement in respect to by-laws not being repugnant etc., is not limited to the Constitution and laws of the United States, and of the State as the same existed at the date of the charter. The language employed points indefinitely to the future.

4. By § 5 of the charter, the board of directors is required to exercise all of the power of the corporation, and make all the by-laws the corporation was authorized to make. The suggestion that the by-laws relating to tolls are required to be made by the board of directors, while those mentioned in the first paragraph of § 8 were to be made by the stockholders or members of the corporation at large, is without foundation.

5. We agree with counsel for plaintiff in error that independently of the *proviso* in § 8, requiring all by-laws etc., not to be repugnant to to the laws of the State, etc., the result would have been the same, and that the company would have had no power to pass by-laws, which were unreasonable, oppressive, or repugnant to the laws of the State had the proviso been omitted.

Field on Corporations, § 296.
1 Potter on Corporations, § § 70, 71.
Angell on Corporations, § 325.

And such being the case, since the charter requires the rates of toll to be fixed by the by-laws, it is manifest that the by-laws fixing the rates must be neither unreasonable, oppressive, nor repugnant to the laws of the State.

6. Where a State has, either in its constitution or general laws, or in provisions of the charter, reserved power to amend, alter or repeal an act of incorporation, the charter of a corporation may not only be amended, but absolutely repealed.

Greenwood v. *Freight Company*, 105 U. S., 13.

If this be so, the more mild and conservative requirement that the by-laws, rules and regulations of the corporation shall not be repugnant to the laws of the State, ought to be given full effect. This limited reservation of legislative control ought not to be frittered away by adverse and hostile construction.

7. Assuming that the language of this charter will bear the construction contended for by counsel for the corporation, viz: that it shall have the absolute and uncontrollable power to fix its own rates of toll, whether reasonable or extortionate, then we insist that such provision could not have the force and efficacy of an obligatory contract. It is not every provision contained in an act of incorporation which constitutes a contract.

Stone v. *Mississippi*, 101 U. S., 814.

Such acts may contain provisions which only have the effect of a license or law, and are therefore subject to revocation or repeal. *Ib.*

It was a part of the prerogative of the British Crown to grant charters conferring corporate franchises. While the king, acting alone, possessed no legislative authority,

he had full authority to make contracts of this nature. Nevertheless the king could not, in the exercise of this power, grant authority to collect unreasonable or excessive tolls. Such a grant would not constitute a valid contract, but would be void.

Coke's Inst., Part 2, Vol. 4, p. 220.

4 Bacon's Abridgement, p. 158.

Hardy v. *Welhouse*, Cro. Eliz., 558.

Wright v. *Bruister*, 24 E. C. L., 60.

While a State legislature may legislate as well as make contracts in reference to the grant of corporate franchises, its power to make contracts of this nature is no greater than was the prerogative of the king.

8. The power to establish tolls etc., conferred upon the corporation, is subject to the implied condition that such tolls must be *reasonable.* #

This is but an application of the conceded principle that the by-laws, rules and regulations of corporations must not be unreasonable, oppressive in their operation, or repugnant to the laws of the State. It is giving effect to the common law principle that an attempt to grant, by charter, the power to collect excessive tolls is void. It is a general rule of the common law that where a person has a monopoly granted to him for public purposes, and the public have the right to resort to his premises for those purposes, he is bound to render the service or use of the thing to which his privilege is annexed for a reasonable compensation.

Field on Corporations, § 42, p. 51.

Hargrave's Law Tracts, Pt. 2, Ch. 6, p. 77.

Allnut v. *Inglis*, 12 East, 530, 538.

Bonaparte v Camden & Amb
R R Co 1 Bald C C. Rep 222-3.

turing companies. They have been very properly designated *quasi* public corporations.

2 Potter on Corporations, § 476.

The police power of the State must be held to embrace the enactment of laws for the punishment and prevention of extortion by those to whom the control and management of the public highways of the State have been entrusted.

4. The courts have uniformly traced to this source the power of the States to pass laws of this nature.

Chosen Freeh's of Hud. Co. v. *The State*, 4 Zab., 728.

Railroad Company v. *Fuller*, 17 Wall., 560.

Munn v. *Illinois*, 94 U S., 125.

Fuller v. *Chi. & N. W. R. R. Co.*, 31 Iowa, 188, 211.

People ex rel. v. *Boston & Alb. R. R. Co.*, 70 N. Y., 570.

Field on Corporations, § § 43, 44.

III.

The Police or Governmental Powers of the State are inalienable, and its Legislature cannot bind itself by contract not to exercise them.

1. It would seem unnecessary to enter into an argument in support of this proposition. This principle has been asserted and maintained with great distinctness in the recent decisions of this Court.

Stone v. *Mississippi*, 101 U. S., 814.

Beer Company v. *Massachusetts*, 97, U. S., 25.

Boyd v. *Alabama*, 94 U. S., 645.

Commonwealth v. *Intoxicating Liq.*, 115 Mass., 153.

Met. Board of Excise v. *Barrie*, 34 N. Y., 657.

2. If, as this Court holds, in *Stone* v. *Mississippi*, *supra*, "the power of governing is a trust committed by

the people to the government, no part of which can be taken away," can a State Legislature, in the same act by which it authorizes property to be taken for public use as a highway, enter into a valid contract abdicating its power and absolving itself and its successors from the duty, to pass all necessary laws to protect the public from extortion and oppression in the use of such highway? Upon both reason and authority, the answer must be in the negative.

3. The reasoning in the Dartmouth College case clearly excludes the idea that a State Legislature may enter into an obligatory contract that no law shall be passed for the government of property, taken under the sovereign authority of the State, for public use.

In the opinion of Chief Justice Marshall (4 Wheat., p. 634), the following question is propounded:

"Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from sovereign authority?"

In that case this question, in all its branches, could properly be answered in the negative.

It is otherwise here. In this case, "The function performed is that of the State."

Olcott v. *Supervisors*, *supra*.

4. Corporations exercising the powers of common carriers should be held as strictly amenable to the law as natural persons performing the same functions. The authority conferred upon them by their charters to exercise certain callings, and carry on certain branches of business, should not be construed as giving a more unlimited or uncontrollable power in the premises than is possessed by a

citizen or partnership firm having the right to exercise the same calling or carry on the same business.

Commonwealth v. *Intoxicating Liquors*, 115 Mass., 153.

Beer Company v. *Massachusetts*, 97 U. S., 25.

Bank of Republic v. *Hamilton County*, 21 Ill., 53.

5. Neither the State nor the National Constitution should be so construed or administered as to work the destruction of the very governments they were ordained to establish and make perpetual.

It cannot be that when the framers of the Constitution of the United States inserted therein the provision that "No State shall * * pass any * * law impairing the obligation of contracts," it was designed or anticipated that the same would be perverted into an authority to State Legislatures to sell, or bind themselves by contract not to exercise their legislative or other proper powers of government. The competency of State Legislatures to make particular contracts is wholly unaffected by this provision.

A State possesses the capacities of a sovereign, and also certain incidental subordinate powers of a mere corporation. By virtue of the former it enacts laws. Through an exercise of the latter it makes contracts.

It is unreasonable to hold that a State Legislature, by an exercise of its subordinate power to make contracts in behalf of the State, can divest the State of its sovereign power to enact laws

The General Assembly of Illinois had authority to exercise, but not sell, the legislative powers conferred upon it. Each successive General Assembly convenes with as full a measure of legislative power as its predecessors.

ARGUMENT FOR THE STATE.

I.

The State has never bound itself by contract that no law shall be passed prescribing reasonable maximum rates of toll for the transportation of passengers and freight upon this railroad.

1. Every legislative grant of corporate privileges or franchises is construed most strongly against the corporation. Nothing can be taken against the State except that which is granted in clear and unmistakable terms. If the language employed is susceptible of more than one interpretation, that which is most favorable to the State will be adopted. Any doubt as to the proper construction is fatal to the claim made by the corporation. "This doctrine is vital to public welfare. It is axiomatic in the jurisprudence of this court."

Fertilizing Co. v. *Hyde Park*, 97 U. S., 666.

The Del. Railroad Tax, 18 Wall., pp. 206, 225.

Charles Riv. Bridge v. *Warren Bridge*, 11 Pet., 420, 546.

Providence Bank v. *Billings*, 4 Pet., p. 514.

United States v. *Arredondo*, 6 Pet., p. 738.

Camden & Amboy R. R. Co. v. *Briggs*, 2 Zab., p. 623.

Sedgewick's Stat. and Const. Law, p. 595.

"And if individuals choose to accept a charter in which the words used are susceptible of different meanings, *or might have been considered by the representatives of the State as words of legislation only, and subject to future revision and repeal, and not as words of contract*, the parties who accept it have no just right to call upon this court to exercise its high power over a State upon doubtful or ambiguous words, nor upon any supposed equitable construction, or inferences made upon other provisions in the act of incorporation."

Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How., 416, 436.

2. In the light of these principles of construction, let us examine the section of the charter which it is claimed confers upon the company the absolute and uncontrollable authority to charge any rates of toll it sees fit for the transportation of passengers and freight, whether reasonable or extortionate. That section contains the following:

"The said company shall have power to make, ordain and establish *all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act*, and for the well ordering, regulating and securing the affairs, business and interests of the company; *Provided*, that the same be not repugnant to the constitution and laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall, from time to time, *by their by-laws*, direct and determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road and the conveyance of passengers and property, shall be in conformity to such *rules and regulations* as said board of directors shall from time to time determine." * *

Private Laws of Ill. of 1851, p. 63, § 8.

Printed Record, p. 30, § 8.

It is but a fair and reasonable construction of this section, that the by-laws establishing the rates of toll for the transportation of persons and property, shall not be repugnant to the laws of the State. It is true that the paragraph respecting tolls is inserted after the proviso; but this circumstance has no controlling significance.

United States v. *Babbitt*, 1 Black, 55, 61.

Mayor of Cumberland v. *McGruder*, 34 Md., 381, 385.

In order to arrive at the true construction, we must take into consideration all of the language employed in the act pertaining to the subject. The tolls authorized to be collected are such, and such only, as may be determined by the by-laws. The proviso, taken in connection with the first paragraph of the section, requires "*all* such by-laws, rules and regulations as may be deemed necessary to fulfil the purposes *and carry into effect the provisions of this act*," etc., "to be not repugnant to the constitution and laws of the United States, or of this State." The paragraph respecting tolls is, certainly, one of the provisions of this act. The by-laws required to be adopted to carry into effect that provision of the act, are, therefore, a part of the by-laws comprehended within the first paragraph of the section, and subject to the limitations of the proviso.

The words "the same" in the proviso, clearly refer for their antecedent to "all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interests of the company." If we should substitute in the place of "the same," the language of the paragraph to which those words refer, the proviso would read thus:

"*Provided*, that all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interests of the company, [which] the said company shall have power to make, ordain and establish, be not repugnant to the constitution and laws of the United States or of this State, or repugnant to this act."

If the proviso in the place of "the same," repeated the clause to which they refer, we presume no one would

claim that the by-laws required to be adopted to regulate the tolls were not embraced within and subject to the limitations of the proviso. Whoever attempted to maintain the contrary, would find it incumbent upon himself to show that the paragraph respecting tolls was not one of the provisions of the act.

We insist that the proper construction of the proviso is precisely the same as it would be if the words "the same" had been omitted and the antecedent words or paragraph to which they refer, had been inserted in their stead.

The paragraph next succeeding the proviso, authorizing the collection of tolls, was not inserted for the purpose of conferring a new or independent power, or authority, to pass by-laws. That power had been conferred in the broadest possible language by the first paragraph of the section. The manifest purpose was to authorize the collection of tolls, a power which had not been previously granted; and which, upon very high authority, could not be implied without an express grant.

Perine v. *Del. & Chesapeake Canal Co.*, 9 How., 172.

Coke's Inst., Part 2, Vol. 4, p. 220.

It will be observed that while authority was thus conferred upon the company to establish and collect tolls for the transportation of persons and property, the same was limited, however, to such tolls as the company should, "from time to time *by their by-laws*, direct and determine."

The rates of toll, therefore, were to be prescribed by the by-laws; and as we have already shown, all the by-laws, rules or regulations made or ordained to carry into effect any of the provisions of the act, were expressly required "to be not repugnant to the Constitution and laws of the United States or of this State."

The purpose of this provision was, not to confer absolute and uncontrollable authority to make any by-laws the company saw fit respecting tolls, unrestrained by the limitations of the proviso, but it was inserted in order to confer authority to establish and collect tolls, with the further requirement that such tolls should be determined by the by-laws, and thus brought within the limitations of the proviso, which clearly embraces all by-laws passed to carry into effect any of the provisions of the act.

This view is confirmed when we take into consideration the last paragraph of the section, viz: "The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall from time to time determine." It would be unreasonable to hold that the "rules and regulations" referred to in this paragraph were not part and parcel of the same "rules and regulations" provided for in the first clause of the section, which by its terms embraces "all such by-laws, rules and regulations as may be deemed expedient, and necessary to fulfil the purposes and carry into effect any of the provisions of this act."

The obvious purpose of this latter provision was to require the company to operate the road and conduct its affairs, in the matters specified, in accordance with the "rules and regulations" adopted by virtue of the grant of power previously made; and the same ought not to be construed as a new and independent grant of power to adopt such rules and regulations as the company might see fit, regardless of the fact as to whether the same were, or

were not, repugnant to the laws and constitution of the State and of the United States. Unless it is held that the portions of the section relative to "by-laws, rules and regulations," which come after the proviso, are embraced within its requirement, that the same shall not be repugnant to the constitution and laws of the State, etc., the proviso becomes a mere meaningless waste of words; for in that case all necessary by-laws, rules and regulations could be adopted by virtue of these latter provisions, and the authority conferred by the first clause of the section subject to the limitations of the proviso, would remain unexercised.

Taking all these provisions of the statute into view, there is nothing which would warrant the inference that the legislature intended thereby to bind the State by contract, that no future law should be passed prescribing maximum rates for the company.

3. The requirement is not that the by-laws, rules and regulations to be adopted by the company in order to fulfill the purposes and carry into effect the provisions of the act, shall not be repugnant to the Constitution and laws of the United States, or of this State, *then in force or theretofore enacted*, but general and unqualified, that such by-laws, rules and regulations, "be not repugnant to the Constitution and laws of the United States or of this State, or repugnant to this act."

This language points to the future, indefinitely, and necessarily embraces the constitution and laws of the United States and of the State of Illinois as the same shall hereafter exist and be in force, from time to time, during the existence of the corporation. It could not have been contemplated that the constitution and laws of the United States and of the State, should for ever remain fixed and

stationary, and not subject to amendment and revision. When the corporation accepted a charter containing a provision in effect that the by-laws, rules and regulations which it was authorized to make and ordain to regulate its management of the road and dealings with the public, should conform to the constitution and laws of the United States and of the State of Illinois, it placed itself, in this regard, in the same position as a citizen of the State, and is equally bound to submit to the operation of amendments to the constitution and laws of the United States and of the State, subsequently made.

4. In the argument of Mr. Jewett, counsel for plaintiff in error, p. [redacted] we find the following: "The power to fix rates is conferred by charter, and upon the board of directors *as distinguished from the corporation itself.*" * * * * "It would seem, therefore, to be reasonably certain that the word *by-law*, as used in the latter part of Sec. 8 of the charter, should not have the same meaning as when used in the previous part of the same section, but should be held simply to signify the action of the board of directors, expressed in any appropriate form, in execution of the power conferred upon them to fix and determine the rates of toll or fare." As we understand it, this argument is predicated upon the fact that the part of section 8 preceding the proviso in terms gave "the said company" power to make all such by-laws, rules and regulations as might be deemed necessary to fulfil the purposes and carry into effect the provisions of the act; while the clause in reference to tolls authorized the board of directors to determine the same "by their by-laws." The argument seems to assume that the by-laws contemplated by the clause preceding the proviso were to be made by a different body, and emanate from another source, than those made by the board of

directors relating to tolls. This attempted distinction is not only unauthorized by the charter, but is in direct conflict with its express provisions.

Undoubtedly the charter of a corporation may authorize its stockholders at their meetings to adopt by-laws in reference to the exercise of the powers of the corporation, but this charter provides otherwise. Thus:

"Sec. 5. *All the corporate powers of said company shall be vested in and be exercised by a board of directors*, and such officers and agents as they shall appoint. The board of directors shall consist of not less than twelve stockholders, three of whom shall be chosen every year by the stockholders, each share having one vote, to be given in person or by proxy, the Governor of the State of Illinois, who shall be a director ex officio, perpetually voting in person or by proxy, each director successively elected to continue in office until his successor is elected and qualified. Vacancies in the board may be filled by a vote of two-thirds of the directors remaining; such appointee to continue in office until the next regular election of directors; but no person shall be so elected who shall not have been openly nominated at a meeting of the directors at least one week before the time appointed for such election."

Printed Record, p. 29.

It will be observed that all of the corporate powers of the company are to be exercised by its board of directors, and that the only thing the stockholders, or members of the company at large, are authorized to do, is to elect directors. It is only in this indirect way that the stockholders can control the action of the directors, so long as they keep within the powers conferred by the charter. There is no provision in the charter of this company conferring upon the stockholders authority to exercise the corporate powers and make by-laws in respect thereto. If the stockholders,

at their meetings, possess an implied power to pass by-laws, the same must be limited to such matters as the stockholders are authorized to act upon at their meetings to elect directors. The board of directors is the only body authorized by the charter to exercise its corporate powers and make by-laws, rules and regulations to fulfil the purposes and carry into effect the provisions of the charter.

The people of the State have a great interest in the question as to how the powers of this corporation should be exercised. A munificent grant of land had been made to aid in building the road. The legislature saw fit to withhold from the persons who might happen to own or control a majority of the stock, the right to exercise the powers of the corporation otherwise than through a board of directors, all of whom, save one, the stockholders were authorized to elect. It was undoubtedly thought better for the interests of all concerned that the power to make by-laws and all other powers of the corporation, should be exercised by this select body, one of whom was the Governor of the State, *ex officio*, than by the corporators at large, who, if they happened to be qualified to discharge such a duty, could rarely, if ever, meet in person to execute the trust. Where authority to exercise such power is conferred by the act of incorporation, or the constating instruments, upon the board of directors, it is held to be exclusive of the authority of the corporate body to otherwise act in the premises.

Field on Corporations, § 299, p. 334.

5. In the same brief of counsel for the plaintiff in error, at page 40, we find this proposition, printed in italics, as the caption of the second division of the argument:

"The right and power of corporation to make by-laws,

rules and regulations respecting their own business, does not depend upon legislative grant. It inheres in the corporations themselves. If the first part of the 8th section of the charter of the Illinois Central Railroad Company, including the proviso, were left out, the authority of the company to make 'by-laws, rules and regulations,' would neither be enlarged nor diminished."

And in elucidation of this general proposition on p. ~~11~~ 34, counsel say:

"The *proviso* is simply a statement of what the law would decide; it adds nothing to and takes nothing from the power of the corporation over the subject matter.

"All by-laws must be consistent with the purposes of the corporation; relate to the management of its business; must be reasonable in their provisions, and not in conflict with existing laws of the State."

And in support of this counsel cites Angell and Ames on Corp., § 325 *et seq.*, 1 Potter on Corp., §§ 70–71, p. 114–115. To which might be added:

Field on Corporations, § 296, where it is said:

"Whether the power to make by-laws is expressly conferred or implied from the constating instruments, such power is always subject to the restriction that such by-laws must be reasonable, not oppressive, nor contrary to public policy or the laws of the State."

Conceding this to be the law, as upon reason and authority we must, how does the company acquire the right to make by-laws fixing the rates of toll, which shall be in conflict with the laws of the State?

If the power to pass by-laws, whether express or implied, is always subject to the limitation that such by-laws must be reasonable in their provisions, and not in conflict with the existing laws of the State, there is certainly no ground left upon which to base the contention that the

State, by the act to incorporate this company, has entered into a contract that no law of the State shall be passed prescribing maximum rates of toll for this company, or that the State will not prohibit the enforcement of by-laws imposing excessive or unreasonable rates. The authority conferred upon the company to collect tolls is accompanied by the requirement that such tolls shall be such as may be determined by the by-laws. If there is an implied limitation resting upon all corporations, that their by-laws must be reasonable and not repugnant to the laws of the State, how can this paragraph of the section relating to the making of by-laws for the establishment of the rates of toll, be construed as a contract that the company shall have power to make and enforce by-laws fixing unreasonable and excessive tolls, and binding the State to pass no law to prevent extortionate charges?

If all the by-laws of the company must be reasonable and not oppressive, by-laws prescribing unreasonable and excessive rates of toll, to be collected from the public, can not be valid. And in such case, the statute of the State limiting such tolls to reasonable maximum rates, does not impair or encroach upon any proper exercise of the power of the company to pass reasonable by-laws regulating tolls.

But to exclude all possible ground for any claim on the part of the corporation that its by-laws might be valid, though inconsistent with the laws of the State, and to preclude all question that the corporation in the adoption of by-laws to carry out any of the provisions of the act, should remain subject to legislative control, this proviso was inserted in § 8, which, when read in connection with its immediate context, clearly requires "all such by-laws, rules and regulations as may be deemed expedient and necessary

to fulfil the purposes of this act" [which] "the said company shall have power to make, ordain and establish" * * "be not repugnant to the constitution and laws of the United States *or of this State*, or repugnant to this act." This limitation upon the powers of the corporation by its express terms embraces all the by-laws made to carry into effect any of the provisions of the act, which necessarily included the provisions of the act respecting by-laws fixing rates of toll.

In view of these clear requirements of the charter, the claim that the State has bound itself by any contract contained in the charter, that no law shall be passed to prevent extortionate and oppressive rates of toll being established by the by-laws of the company and enforced against the public, in the use of this road, is manifestly without foundation.

6. The considerate judgment of all impartial minds, is that the public interest and the dictates of a sound policy demand that corporations, in the exercise of their great powers, should be kept subject to legislative control, lest they should become engines of evil, instead of promoting the public purposes for which they were organized. Most of the States have undertaken to guard against these evils by inserting either in the constitution or in some general law, a provision to the effect that all acts of incorporation should be subject to alteration, amendment or repeal. Where this is done the validity of such amendatory or repealing acts, is fully sustained.

Greenwood v. *Freight Company*, 105 U. S., 13.

The State of Illinois has hitherto seen fit to forbear the exercise of this wise precaution. In its stead, we find certain limitations in the constitution of 1870, aimed at such

abuses of corporate power as at that date had been most keenly felt by the people; but none of them have the sweeping scope of a reserved power to amend, alter or repeal all acts of incorporation. We also find in many of the acts of incorporation, passed prior to 1870, provisions corresponding with § 8 of the act to incorporate the Illinois Central Railroad Company, which not only authorize, but require the corporation to make and ordain by-laws, rules and regulations which shall be observed and complied with in the exercise of their corporate powers, with the qualification annexed that such by-laws, rules and regulations be not repugnant to the Constitution and laws of the United States or of the State.

The State does not claim the full and unqualified power to amend or repeal the act by which this company was incorporated. It is claimed, however, in behalf of the State, that the by-laws, rules and regulations of the company, in respect to every matter wherein the act of incorporation, by any of its provisions, requires such by-laws, rules and regulations, to regulate the same, shall not be repugnant to the laws of the State. This right is reserved to the State on the face of the charter. The by-laws of the company prescribing its rates of toll for the transportation of persons or property, cannot, therefore, have any validity, so far as they are repugnant to, or in conflict with, the laws of the State fixing, or providing for the establishment of, maximum rates of toll.

If the unqualified reservation of power to amend or repeal acts of incorporation is sustained, the more moderate and conservative requirement that the by-laws, rules and regulations which the company is required to adopt, to regulate the exercise of its corporate franchises, shall not be

repugnant to the laws of the State, ought, certainly, to be upheld and given full effect.

7. Assuming that the section of this charter in respect to tolls will bear the construction for which the learned counsel for the railroad corporation contend, viz: that the corporation shall have the absolute and uncontrollable authority to fix its own tolls, whether reasonable or extortionate, and that its by-laws prescribing rates of toll are valid, although repugnant to the laws of the State, the question arises whether such a provision possesses the qualities, and is entitled to protection as an obligatory contract.

Under our polity and system of government all grants of corporate franchises are made by the legislative department of the government under the form of legislative enactments. Such acts of incorporation not unfrequently contain provisions which in their essence and nature are mere *laws* and not *contracts.*

To mark and emphasize this fact, as well as distinction, in *Stone* v. *Mississippi*, 101 U. S., 814, this Court found it necessary to say: "In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are."

It is not true, therefore, that every provision contained in an act of a legislative body to incorporate a railroad company is invested with the force and efficacy of an obligatory contract, and thus brought within the protection of the Federal Constitution.

Such charters or acts of incorporation may, and often do, contain provisions which only have force and effect as laws, and are therefore subject to amendment or repeal.

No better illustration of this proposition can be found than the act to incorporate this company, now before the Court. The 9th section (Printed Record, p. 30) for example, provides for the prosecution by indictment, and the fine, or imprisonment in the State penitentiary, of all persons who shall carelessly, willfully, maliciously or wantonly commit certain specified depredations upon the road, or obstruct the running of its trains, etc. Other sections of the act define certain duties and impose certain penalties upon the corporation, its employes and agents, for violation thereof; and regulate the mode of prosecution to recover such penalties. Printed Record, p. 32, §§ 12, 13.

We presume no one would claim that these sections were obligatory upon the State as contracts. Whatever validity they possess is that of mere laws, as distinguished from contracts. While certain of the provisions of the charter of this company have been held to impose the obligations of a contract, it does not therefore follow that everything contained in the charter was of like obligation as a contract.

While it is true that a State Legislature has power to legislate as well as make contracts in the passage of an act providing for the incorporation of a railroad company, yet its power to make valid contracts of this nature is no greater than that possessed by the British Crown.

The King, in the exercise of his prerogative, possessed ample authority to make contracts granting corporate franchises, but could not enact laws without the concurrence of parliament.

If we can ascertain, therefore, what, upon principle and authority, were the limits to the power of the British Crown to make charter contracts, the same will serve as a trustworthy guide to mark the distinction in our legislative acts of incorporation, between those provisions which should be treated as possessing the obligations of a contract, and others which only have effect as laws.

The practice has been quite common to refer, without accurate discrimination, to every charter or act of incorporation as a *contract*. This language may have been strictly proper when applied to charters creating corporations granted by the British Crown. The King, acting alone and without the concurrence of parliament, possessed no legislative authority. Charters granted by him conferring corporate franchises were valid so far, and so far only, as they constituted contracts. If they contained provisions not properly the subject of contracts, such provisions were void and conferred no rights. Thus while the King had power to grant the franchise to maintain a fair or public market, and to authorize the collection of tolls, yet the tolls so authorized must be reasonable and not excessive, otherwise the grant as to tolls would be void. Lord Coke states the law thus:

"Every one that hath a faire or market, ought to have it by graunt or prescription; if the King graunt to a man a faire or market, and graunt no toll, the patentee shall have no toll, for toll being a matter of private for the benefit of the lord is not incident to a faire or market so graunted without a speciall graunt, as it was adjudged in the case of Northampton; for such a faire or market is accounted a free faire or market; and there it was also resolved, that after such a graunt made the King cannot graunt a toll to such a free faire or market without *quid pro quo*, some proportionable benefit to the subject. Lastly, it was there resolved

that if the toll graunted with the faire or market bee outragious or unreasonable, the graunt of the toll is void, and that the same is a free market or faire."

Coke's Institutes, Part 2, Vol. 4, p. 220.

Tolls which "bee outragious or unreasonable" are thus defined by the same authority: "*Outragious.*] That is either where a reasonable toll is due, and excessive toll is taken, or where no toll at all is due, and yet toll is unjustly usurped, for it is an outrage to doe such a common injury and wrong." *Ibid*, p. 219.

"Also, if the King at the time he grants a fair or market, grants a toll, and the same is outrageous and excessive, the grant of the toll is void, and the same becomes a free fair or market."

4 Bacon's Abridgment, p. 158.

"The King cannot appoint a burthensome toll." If the toll specified in the grant or charter is excessive, the grant is void.

Heddy v. *Welhouse*, Cro. Eliz., 558.

Wright v. *Bruister*, 24 E. C. L., 60.

The same principle is recognized and enforced in Lord Hale's Treatise *De Portibus Maris*, as to tolls or duties charged for the use of public wharves, etc., quoted in *Munn* v. *Illinois*, 94 U. S., 127, where it is said: "In that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c.; neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, *though settled by the King's license or charter.*"

We find thus firmly fixed in the common law a reasonable and just limit to the power by charter contract to confer the right to collect tolls from the public. The limit is

that the tolls granted by contract must be *reasonable*. An attempt thus to grant the right to collect excessive tolls is simply void as a mere contract.

The sturdy English judges and sages of the common law set up this barrier in behalf of common right, and to protect the people from the greed of monopolists. It was a part of the common law at the time of the adoption of our Constitution, as firmly established as the principles of Magna Charta itself, that an attempt to grant by charter the right to collect excessive tolls was not a contract, but void, and conferred no rights whatever. Is it reasonable to hold that the framers of our Constitution intended to throw the shield of its protection over such pretended contracts, thus condemned as absolutely void?

Counsel for plaintiff in error seem to rely upon the expressions contained in the opinions of this Court in the Railroad Rate cases reported in 94 U. S., pp. 155–182, to the effect that railroad corporations are subject to legislative control in respect to their rates of charge, "unless protected by their charters," etc., as authority in support of the contention of counsel that it was competent for the State Legislature to confer upon the corporation *by contract*, the absolute and uncontrollable right to charge such rates as it sees fit, whether reasonable or extortionate.

As we read the opinions, the Court in fact decided no such question. The most that can be fairly claimed is, the question was left undecided. This is apparent from what is said in *C. B. & Q. R. R. Co.* v. *Iowa*, 94 U. S., at page 161:

"This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must

carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. *It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter;* and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter *might* have presented a contract against future legislative interference."

In the present case there was no legislation fixing the maximum rate, nor any undertaking on the part of the State that it would not pass laws prescribing maximum rates. The case suggested by the Court, therefore, does not arise upon this record.

If excessive rates are prescribed by the laws of the State, it might not be illegal for the corporation to conform to such law, so long as it remains in force, independently of any question of contract.

8. *The power to establish tolls, etc., conferred upon this company, is subject to the implied condition that such tolls must be reasonable.*

If, as we have shown upon authority, the right to collect excessive or unreasonable tolls cannot be conferred by charter contract, all general grants of power to collect tolls, if valid at all, must be subject to this implied condition. Such limitation is but an application of the principle that the by-laws, rules and regulations of corporations must be reasonable.

Moreover: Under the powers usually granted, every

railroad corporation has the exclusive right to operate its line of road, and is thus invested with a monopoly of one of the public highways of the State. It is a monopoly granted to the corporation for public purposes. The public have the right to demand that due facilities be provided for the transportation of passengers and freight, and to resort to the road for that purpose.

It is a general rule of law, that where a person has a monopoly granted to him for public purposes, and the public have the right to resort to his premises for those purposes, he is bound to render the service or use of the thing to which his privilege is annexed, for a reasonable compensation.

1 Hargrave's Law Tracts, Part 2, Chap. 6, p. 77.

Allnut v. *Inglis*, 12 East, 530, 538.

Field on Corporations, § 42, p. 51.

The Common Law imposes this restriction upon all common carriers, including railroad corporations.

Hutchinson on Carriers, § 447.

Munn v. *Illinois*, 94 U. S., 133.

It ought not to be readily presumed that any State intends to repeal this salutary rule of the common law. The principle upon which this implied limitation rests was fully and ably stated in the opinion of the Supreme Court of Illinois, delivered by Chief Justice Lawrence, in the case of *Chicago & Alton Railroad Co.* v. *The People*, 67 Ill., p. 16. It is there said:

"Conceding, for the purposes of this appeal, all that is claimed by counsel for the appellant in regard to the inviolability of railroad charters, regarded in the light of contracts, we are still of opinion that the legislature has the

clearest right to pass an act for the purpose of preventing an unjust discrimination in railway freights, whether as between individuals or communities, and to enforce its observance by appropriate penalties.

"The grounds of this opinion may be briefly stated, and they are as follows: A railroad company is chartered solely for the purpose of exercising the functions and performing the duties of a common carrier. The duties and liabilities of common carriers are clearly defined by the common law, and have been so defined for centuries. In all commercial countries the law upon this subject is one of the most important branches of legal science, and its leading principles were established by the courts of England at an early day. One of these principles is, that nothing excuses the carrier for the non-delivery of the goods received by him for carriage, except the act of God, or the public enemy.

"We do not find it written in the charter of railroad corporations in this State, that they shall exercise their franchises subject to this stringent liability, yet, nevertheless, the court has firmly held them to it, not permitting them to evade it even by a notice, or by any means short of a special contract with the shipper, to which his free assent must be shown to have been given.

"Another perfectly well settled rule of the common law is, that they shall not exercise unjust and injurious discrimination between individuals in their rates of toll. In the language of Chief Justice Holt, when delivering the opinion of the court of King's bench in the celebrated case of *Coggs* v. *Bernard*, decided in 1703, the common carrier exercises a public employment, and it necessarily follows that he must deal with the public fairly and without unjust discrimination. This common law duty of common carriers is not prescribed in the charters of railroad corporations, but, like the other duty of delivering goods in safety unless prevented by the act of God or the public enemy, it attaches to them by virtue of their function as common carriers, the

moment they commence the transportation of freight. In accepting their charters, which gave them an artificial existence as common carriers, they necessarily accepted them with all the duties and liabilities attached by the existing law to the function of common carrier. This proposition to our minds seems so plain as hardly to admit of more argument than an axiom in mathematics.

"While the law now imposes and always has imposed upon individuals exercising the vocation of a common carrier, the obligation of rendering service to all persons without injustice to any, how utterly unreasonable it is to claim that a corporation is to be permitted to discriminate in its tolls, at its own discretion and without regard to justice, merely because the legislature, in the charter that created it for the purpose of exercising a like vocation, has authorized it to establish rates of toll without in terms providing that they shall be free from unjust discrimination. What was the import of that grant, made, as it was, in broad and general terms? Clearly, nothing more than that the corporation should have the same right of establishing tolls that a natural person has when acting as common carrier—a right to be exercised within the same limitations that the common law in behalf of justice and public policy, imposes upon the natural man.

"This case has been argued on both sides with commendable ability and candor, and we avail ourselves of an admission made by counsel for the company to illustrate the position we are enforcing. It is conceded by counsel, in express terms, that a natural person is not allowed to make unreasonable and excessive charges as a common carrier, and an artificial being is subject to the same restrictions. It is of course contended by counsel that the legislature has no power to determine what charges are reasonable or unreasonable, but with that branch of the question we have in this case no concern. It is undoubtedly true, as conceded by counsel, that the artificial person has no more right than the natural person to make unreasona-

ble and excessive charges as common carriers. And why? This restriction is not found in railway charters, as generally framed, and certainly not in the charter presented by the record, in regard to which counsel are speaking. The obvious reason is the principle we have already stated. *The rule forbidding unreasonable charges was a common law rule when these charters were granted, and the companies accepted their charters with this implied limitation upon the power granted, in general terms, to establish their rates of freight. If this implied condition against unreasonable rates of freight attached by the existing law to their charters, at the date of their acceptance, on what ground can it be held that the corresponding condition against unjust discrimination did not equally attach?* There is no ground for the distinction."

This was the view taken of the question by the Supreme Court of Illinois, in the present case.

Ruggles v. *The People*, 91 Ill., 265.

This principle has been fully recognized by the English courts as applicable to the construction of acts of parliament to incorporate, or to regulate railroad companies, although the disposition of the cases did not require its actual decision. Thus in the case of *Crouch* v. *Northern Railway Company*, 11 Excheq., 742, where an act of parliament provided that: "As regards small packages and single articles of great weight, notwithstanding the rate of tolls prescribed by this act, the said companies may lawfully demand the tolls following, that is to say: For the carriage of small parcels, that is to say, any parcel not exceeding five hundred pounds weight, the said companies may demand *any sum which they may think fit*," it was construed as meaning any *reasonable* sum they may think fit. ALDERSON, B., says: "Moreover I do not think we should have much difficulty in construing the 14th section

of the 13 & 14 Vict., c. lxi.; it means such charges made by the company as, in the opinion of a jury, are reasonable charges. I think that the company are not at liberty to charge what they please; and that the word 'reasonable' must be considered as introduced into the section. This is merely an *obiter dictum*, and not necessary for the decision of the case; but I give it as my opinion." *Ibid*, 752.

In the subsequent case of *Piddington* v. *S. E. Railway Co.*, 94 Eng. Com. Law, p. 111, WILLIAMS, J., says:

"I am of opinion that this rule should be discharged. It is unnecessary, in the view we take of this case, to decide whether or not the opinion thrown out by Alderson, J., in *Crouch* v. *The Great Northern Railway Company*, 11 Exch., 742, that the 14th section of 13 & 14 Vict., c. lxi. (the language of which is similar to that of the 133d section of the 6 W. 4, c. lxxv.), was to be read as if the word 'reasonable' had been contained therein, is correct. I do not mean to express any dissent from that opinion; but I do not think the present case calls for any expression of opinion upon the point. I may, however, observe that it seems to me to be a strong proposition to say that the 133d section of the 6 W. 4, c. lxxv., authorizes the company to charge for small parcels, not exceeding 100 lbs. weight each, whatever sum they please." *Ibid*, p. 117.

In the same case, WILLES, J., says:

"Then are the company bound to make *reasonable* charges? that depends upon the proper construction of the 133d section of the 6 W. 4, c. lxxv. I think there is very great weight in the observation of Alderson, B., in *Crouch* v. *The Great Northern Railway Company*, 11 Exch., 742, 752; but it is not necessary for us to express any opinion upon that point." *Ibid*, p. 120.

These *dicta*, if they be such, not only rest upon a firm foundation of reason and justice, but they were a pertinent

application of common law principles, familiar to the English courts.

Thus in *Allnutt* v. *Inglis*, *supra*, Lord Ellenborough, C. J., holds upon the authority of Lord Hale, that: "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent perform the duty attached to it, on reasonable terms." 12 East., p. 538.

The other judges concurred in this view. Grose, J.: "And if we attend to the principle of law by which monopolies are regulated, and apply to this case what is laid down by Lord Hale upon that subject, it is impossible to say that this company do not come within that principle." *Ib.*, 541.

Le Blanc, J.: "But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that where private property is affected with a public interest, it ceases to be *juris privati* only; and in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable. That principle was followed up in the case of *Bolt* v. *Stennett;* for there the quay being one of the public quays licensed under the statute of *Elizabeth*, it was held that the owner was bound to permit the use of the crane upon it, and could not insist either that the public should not use the crane at all, or should use it only upon his own terms, but that he was bound to permit the use of it upon reasonable terms." *Ib.*, 542.

The judgment of the court rested upon the principle thus declared.

From the authorities we have cited, it is certainly not clear beyond reasonable question, that the language used

in the railroad charter now under consideration, confers upon the corporation organized thereunder, the unqualified and uncontrollable power to fix any rate for the transportation of passengers it may think proper. And this is sufficient for our purpose. For, as we have already shown, the State cannot be divested of its power to pass laws prescribing reasonable maximum rates, unless such purpose is declared in clear and unmistakable terms.

9. *If this charter is subject to the implied limitation that the tolls thereby authorized to be fixed by the company must be reasonable, how, and by whom, is the reasonableness of the tolls to be determined?* This question is fully answered by the authorities. In *Munn* v. *Illinois*, 94 U. S. 133, this court said: "It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price.

Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use. But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

Peik v. *Chicago & N. W. Ry Co.*, *Ib.*, 165, 178.

Winona & St. Paul R. R. v. Blake, *Ib.*, 180.

Field on Corporations, §§ 43, 44, pp. 53, 55.

We submit, therefore, upon the hypothesis that it is competent for a State Legislature to make a valid contract obligatory upon itself and its successors, that no law shall be passed prescribing reasonable maximum rates for the transportation of passengers upon railroads, that it does not appear in this case that the General Assembly of Illinois has, in fact, made any such contract.

II.

The enactment of Laws to prevent Extortion by those having control of such Public Highways as Railroads, is a legitimate exercise of the Police Power of the State.

1. The following authorities, if not a definition, will

show the general nature and scope of that reserved power, inherent in every State, termed the "police power:"

"The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order, *and to prevent offenses against the State*, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as reasonably consistent with a like enjoyment of rights by others."

Cooley on Const. Lim., 572.

"We think it a settled principle," says Chief Justice Shaw, "growing out of the nature of well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, *nor injurious to the rights of the community.* All property in this commonwealth is held subject to those regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of government to take and appropriate property whenever the public exigency requires it, which can only be done on condition of providing a reasonable compensation therefor. The power we refer to is rather the police power; *the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall*

judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark the boundaries or prescribe limits to its exercise."

Commonwealth v. *Alger*, 7 Cushing, 84.

The Supreme Court of Illinois uses this language:

"The power to enact police regulations operates upon all alike. This is a fundamental principle, and lies at the foundation of society itself. It is yielded by each member, when he enters society, for the benefit of all. It is incident to, and a part of government itself, and need not be expressly reserved, when it grants rights or property to individuals or corporate bodies, as they take subservient to this right. Although individual rights may be said to be absolute, they are all subject to be controlled in their enjoyment for the general good. * * * * * The law has imposed all these and many other duties and prohibitions upon individuals for the protection of citizens, their morals and property; and notwithstanding it may appear in some degree to abridge individuals of a portion of their rights, yet we are not aware that their constitutionality has ever been challenged. Their eminent justice and propriety has commended them to the community at large as highly proper. The exercise of the power may be referred to the maxim, '*Salus populi suprema est lex*,' 'That regard be had to the public welfare, is the highest law.'"

O. & M. R. Co. v. McClelland, 25 Ill., 144.

The nature and extent of this power was fully considered in this Court at an early day in *City of New York* v. *Miln*, 11 Peters, 102, where in the opinion of the Court, at page 139, it is said:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction

over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, *or what may, perhaps, more properly be called internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive. We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of a State; whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction. But we will endeavor to illustrate our meaning, rather by exemplification than by definition. *No one will deny, that a State has the right to punish any individual found within its jurisdiction, who shall have committed an offense within its jurisdiction against its criminal laws.*"

Chief Justice Taney, in the License Cases, thus defines the police powers of a State:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, *or a law to punish offenses*, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

License Cases, 5 Howard, 583.

All the authorities agree that the power to enact laws for the punishment of offenses is embraced within the police powers of the State. Whatever difficulties have arisen in efforts to define the limits of this power, it has ever been conceded that the enactment of laws providing for the punishment of crimes and misdemeanors was an exercise of that power.

N. W. Fertilizing Co. v. *Hyde Park*, 70 Ill., 643.

2. The commission of the offense of extortion is not necessarily confined to public officers, strictly speaking. It may be committed by any person who pursues a public employment, and sustains such relations to the public that the people must, without great inconvenience, necessarily deal with him.

Thus at common law: "In the case of a miller, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion; and the same if a ferryman takes more than his due by custom for the use of his ferry. And it was held that if the farmer of a market erects so many stalls as not to leave sufficient room for the market people to stand and sell their wares, so that, for want of room, they are forced to hire stalls of the farmer, the taking money for the use of the stalls in such a case is extortion."

2 Bishop's Crim. Law (5th Ed.), § 394.

Rex v. *Burdett*, 1 Ld. Raymond, 148.

Rex v. *Roberts*, 4 Mod , 101.

1 Russell on Crimes, 143.

Railroad companies entrusted with the control and management of the public highways, which the people must of necessity use, may be guilty of extortion in a legal sense.

The individual citizen and the railroad corporation do not stand upon terms of equality in making contracts as to rates to be paid for transportation. The corporation possesses every facility for the practice of extortion. In the discussion of a question closely allied to the one now under consideration, in *Railroad Company* v. *Lockwood*, 17 Wall., 379, this court said: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business." * * * * * *

"If the customer had any real freedom of choice; if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body

politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept."

It necessarily follows that they may practice extortion. Extortion has ever been regarded as a crime punishable by law. Is it within the power of any State Legislature to make valid contracts with particular persons or corporations, exempting them from the operation of any laws which may be subsequently enacted to provide for the punishment of such a crime?

The constitution of Illinois, adopted by the people of that State in 1870, contains the following:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Art. XI., § 15.

Was it ever within the power of any State Legislature to enter into a valid contract, obligatory upon the State and its people in their sovereign capacity, exempting a particular corporation, having the control of a public highway, from the operation of laws of the nature required by this section of the constitution?

If the State had, by a valid contract, bound itself not to exercise this power as respects a particular corporation, we do not claim that it could regain the power by an amendment to the constitution. But the question is, was it ever competent for any State Legislature to enter into a valid contract, obligatory upon the people of the State in their sovereign capacity, depriving them of the power to pro-

hibit and punish extortion committed by such a corporation? We submit that it was not.

3. Railroads are public highways, and the sovereign power of taxation and eminent domain may be brought into exercise to aid in their construction.

2 Potter on Corporations, § 474.

R. R. Com'rs v. *P. & O. R. R. Co.*, 63 Me., 269.

West River Bridge Co. v. *Dix*, 6 How., 546.

Chicago, D. & V. R. R. Co. v. *Smith*, 62 Ill., 268.

Olcutt v. *Supervisors*, 16 Wall., 678.

Although this proposition is stoutly resisted in the argument of counsel for plaintiff in error (p. 71), it is fully sustained by the authorities.

In the case last cited, this Court said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose, whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a State Legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one, is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legis-

lative grant. It would be useless to cite the numerous decisions to this effect which have been made in the State courts. We may, however, refer to two or three which exhibit fully not only the doctrine itself, but the reasons upon which it rests. Whether the use of a railroad is a public or a private one, depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freight is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

Olcutt v. *Supervisors*, 16 Wall., 694, 695.

Railroads are now regarded as *quasi* public corporations.

2 Potter on Corp., § 475.

Each railroad corporation is entrusted with a monopoly of one or more of the public highways of the State, and possesses every facility for the practice of extortion upon the public. The power to enact laws to define and punish this offense is, we submit, embraced within any admissible definition of the police powers of the State.

4. The courts have uniformly traced to this source the power of the States to pass laws of this nature. Thus in the case of *Chosen Freeholders of Hudson Co.* v. *The*

State, (4 Zabriske, 728,) the Supreme Court of New Jersey say:

"The regulation of tolls of bridges and turnpike roads, and the fares of railroads and ferries, is in no just sense a regulation of commerce, and has never been so regarded. *It is a part of that general power of police*, essential to every State, and which could not be with safety, and has not been, surrendered to the general government."

In *Munn* v. *Illinois*, 94 U. S., 125, this Court say:

"From this source [referring to the maxim *sic utere tuo ut alienum non lædas*] come the *police powers*, which, as was said by Mr. Chief Justice Taney, in the *License Cases*, 5 How., 583, 'are nothing more or less than the powers of government inherent in every sovereignty, that is to say, the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

So, in *Railroad Company* v. *Fuller*, 17 Wall., 560, this Court held that an act of a State legislature was a police law, which required each railroad company at specified times, annually, to fix its rates for the transportation of passengers and freight, and to cause printed copies thereof to be kept posted at all its stations, and for a failure to fulfill these requirements, *or for charging higher rates than those posted*, imposed penalties upon the offending company. The court say: "The statute was doubtless deemed to be called for by the interests of the community to be

affected by it, and it rests upon a solid foundation of reason and justice. It is not, in the sense of the constitution, in any wise a regulation of commerce. *It is a police regulation.* * * * If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, *regulations of commerce*, the question would arise, whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. *But as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject.*" *Ib.*, 567, 570.

And the Supreme Court of Iowa sustained the constitutional validity of the same statute, upon the same ground, viz: that its enactment was a proper exercise of the police power of the State, and that its provisions were in the nature of police regulations.

Fuller v. *Chicago & N. W. Ry. Co.*, 31 Iowa, 188, 211.

In the case of *People ex rel.* v. *Boston & Albany Railroad Company*, 70 N. Y., 570, the Court of Appeals of that State hold that:

"Railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them, may regulate the mode in which they shall transact their business, *the price which they shall charge for the transportation of freight and passengers*, the speed at which they may run their trains, and the way in which they may cross or run upon highways and turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads, or passing upon highways crossed by rail-

roads. All this is within the domain of legis ative power, although the power to alter and amend the charters of such corporations has not been reserved.

"This whole subject of legislative power over railroads, and even private persons holding and using their property for public purposes, has been so fully discussed recently in the Supreme Court of the United States, in the *Granger Cases* and the *Chicago Elevator Case*, as to make further discussion unnecessary here. Such legislation violates no contract, takes away no property, and interferes with no vested right."

The subject of the power of a State Legislature to regulate the charges of railroad corporations for the carriage of passengers and freight is fully considered on principle and authority in the recent treatise of Field on Corporations, § § 39–44. After an elaborate review of the authorities bearing on the question, including the recent decisions of this Court, the author concludes thus:

"Sec. 43. The general principle which allows legislation in these cases on the ground of the public nature of the property or business in which the person is engaged, would be particularly applicable to common carriers; and especially to that class of them which operate our railroads. Their business is particularly 'affected with a public interest.' Their property is employed in a manner that directly affects the body of the people. The corporate franchise is granted, and extraordinary powers conferred on such corporations, in order that they may the better serve the public in the capacity of common carriers; they are certainly engaged in a public employment which affects the public interest, and are within the reasoning of the class of cases where the right of legislative control has uniformly been sustained."

"Sec. 44. It is evident that the Legislature has the right to regulate the prices of railroad companies, and especially to fix the maximum rates which they may charge

for fare and freight, *even when the right to regulate and control them, or to amend or repeal their charters, is not contained in the act or general statutes under which they are instituted or created.* The doctrine is that the Legislature creating them, or by or under whose acts they are created, may regulate and fix the maximum or reasonable charges which they may receive the same as though they were private persons; *and that such regulation is not any violation of the corporate contract, or any infringement of the constitutional rights of the corporation, whose charges are thus fixed or regulated.* The right of the Legislature to regulate the charges of a private person engaged in an employment of general public interest or concern, seems to be settled by a uniform current of decisions, and there would seem to be no reason, based upon principle or any sound public policy, against the right of the Legislature to provide for and regulate the rates of fare and freight of incorporated companies, organized and instistituted for the purpose of carrying persons or property."

Field on Corporations, pp. 51, 53.

5. It is urged by counsel for plaintiff in error that state laws prescribing maximum rates of toll upon railroads deprive the corporation of property without due process of law, and are therefore repugnant to the XIV Amendment to the constitution of the United States.

This question was met and decided in *Munn* v. *Illinois*, 94 U.S., 125, where after a full review of the subject, upon principle and authority, it is said:

"From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply

prevents the States from doing that which operate as such a deprivation."

And the subsequent cases sustaining the validity of State laws prescribing such maximum rates, are all authorities against any such construction of the Fourteenth Amendment.

Shields v. *Ohio*, 95 U. S., 319.

C. B. & Q. R. R. Co., v. *Iowa*, 94 U. S., 155.

Peik v. *C. & N. W. Ry. Co.*, *Ib.* 165.

Winona & St. Peter Ry. Co. v. *Blake*, *Ib.* 180.

It may be proper in this connection to briefly notice an idea which seems to run all through the argument of the learned counsel for plaintiff in error and, as we think, gives a false coloring to every proposition advanced by him. When reduced to a few words, it is this: If the power of the State to prescribe maximum rates of toll, and generally exercise legislative control over railroads, is established and settled as a recognized power in our system of government, it will prove destructive to these great interests, and render insecure the millions—nay billions, of capital invested in them, and entail upon all concerned, some dire and fearful calamity.

Now it happens to be true, that in a majority of the States, the power to amend acts of incorporation is expressly reserved, either in the State Constitution or in some general law; and in cases which have been brought to this Court from at least four of the States, Ohio, Iowa, Wisconsin and Minnesota, (cited above), the power to pass laws prescribing such maximum rates, and exercise such legislative control over railroads, has been repeatedly affirmed and sustained by this Court. Years have elapsed since those decisions were announced, yet we have not heard

that any serious calamity has befallen these great railroad interests in either of those States. There is no reason to apprehend that it would be worse in Illinois. More than half of the lines of railroad in Illinois, have been either built since the adoption of the new Constitution in 1870, or sold out under mortgage foreclosures, and are now owned and operated by corporations formed under the general law passed since 1870, and are, therefore, unquestionably subject to legislative control in respect to rates of toll. Yet no one can fairly claim that those roads are greatly oppressed, or dealt with in any unfriendly spirit, or that the capital invested in them has been rendered insecure. On the contrary it appears that in 1873, the legislature of Illinois repealed the act of 1871, which absolutely fixed the maximum rates for the carriage of passengers, and in its place substituted the present law, which simply makes the schedule of rates made by the Board of Railroad and Warehouse Commissioners, *prima facie* evidence as to what are reasonable rates, leaving it an open question, to be settled upon evidence on the trial of each case. This is the mildest possible exercise of the power in question. It is believed that the very fact that the power of the State to exercise such legislative control is established, will of itself prevent any gross abuse of their privileges on the part of the railroad corporations. Nothing but a gross abuse of power on their part will awaken such a public sentiment as would evoke severe corrective legislation on the part of the State.

No one has greater interest in promoting the prosperity of railroads, and in their successful working, than the people of the States through which they run; and no one would sustain greater loss by any failure or inefficiency in their operation than the people for whose use, as public

highways, they were built; and no one can have less motive to destroy their capacity for usefulness to the public. Every one knows that unless their rates are reasonably remunerative, they could not long be kept in operation. The assumption of the great wrongs and appalling evils which would result from the exercise of such controlling power by the State, which stands out so conspicuously in the argument of the learned counsel, is clearly without foundation.

III.

The Police or Governmental Powers of the State are inalienable, and its Legislature cannot bind itself by contract not to exercise them.

It would seem unnecessary to enter into an argument in support of this proposition. This principle has been asserted and maintained with great distinctness in the recent decisions of this Court.

1. In the opinion of this Court, in the case of *Stone* v. *Mississippi*, 101 U. S., 814, after referring to the *Dartmouth College Case*, 4 Wheaton, 518, holding that a charter to a private corporation may contain a contract which cannot be impaired by subsequent legislation, it is said:

"In this connection, however, it is to be kept in mind that it is not the *charter* which is protected, but only any *contract* the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act. Consequently the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are."

And after discussing the terms of the charter, which authorized the maintenance of a lottery for the term of twenty-five years for an express pecuniary consideration, the opinion proceeds:

"If the legislature that granted this charter had the

power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate existence, there is no doubt about the sufficiency of the language employed to effect that object. * * * Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State, and the people of the State, in that way. All agree that the legislature cannot bargain away the police power of a State."

The Court then quote with approbation the following from *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y., 657: "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." And further on (p. 820), the Court lay down these general propositions, the soundness of which ought never to be questioned:

"But the power of governing is a trust committed by the people to the government, no part of which can be granted away. * * * * * *

"The contracts which the Constitution protects are those that relate to property rights, not governmental."

101 U. S., 820.

In the case of *Beer Company* v. *Massachusetts*, 97 U. S., 25, it is said:

"But there is another question in the case, which, as it seems to us, is equally decisive. The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all their varieties,' it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed

as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. * * * Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, '*salus populi suprema lex;*' and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can be no more bargained away than the power itself." *Ib.*, pp. 32, 33.

In *Boyd* v. *Alabama*, 94 U. S., 645, at the conclusion of the opinion the Court say: "We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals." *Ib.*, p. 650.

In the *Delaware Railroad Tax Case*, 18 Wall., 226, while it was held on the principle of *stare decisis*, that a State might enter into a valid contract exempting property from taxation, it was assumed as settled law that a State could not make a contract whereby it surrendered its police

power, or power of eminent domain. In the opinion of the Court, delivered by Field, Justice, it is said:

"If the point were not already adjudged, it would admit of grave consideration, whether the legislature of a State can surrender this power [of taxation], and make its action in this respect binding upon its successors, *any more than it can surrender its police power*, or its right of eminent domain."

We quote at length the opinion of the Supreme Court of Massachusetts, in the case of *Commonwealth* v. *Intoxicating Liquors*, 115 Mass., 153:

ELLIOTT, J.: "The claimant in this case contends that having been created a corporation for the purpose of manufacturing malt liquors under a charter which the legislature has no power to alter, modify or repeal, it has the right to sell the products of its manufacture, notwithstanding the provisions of the statute of 1869, c. 415, relating to the manufacture and sale of intoxicating liquors. We do not think this position is tenable. By its charter the claimant is a private manufacturing corporation, with the same power as a natural person to do that which its charter authorizes; and by implication with the same power as an individual to deal with and sell its property so manufactured. But the authority of the legislature over the property or the use of the property of a corporation is not lost, because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting or prohibiting the sale of a particular kind of property, for the general benefit, apply as well to the property of corporations, like the claimant, as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike subject to them. Indeed all property is held subject to such restriction, and it is immaterial that the restriction is imposed after the property is acquired or becomes valuable, or after the charter is granted, or before it became

necessary in the judgment of the legislature to pass a law on the subject. Every such law limits, restrains, impairs and in some cases destroys the uses, which were previously enjoyed, of the property so made the subject of legislation, but the extent to which it may do so does not affect the validity of such laws, or their equal application to all owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury in the proper and legal sense of these terms.

"The statute of 1869, c. 415, does not therefore impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as upon individuals."

2. It is true, that in some of the earlier cases in the State courts, wherein the proposition was advanced that the police power of the State could not be granted away by contract, the subject was approached with much hesitation, and apparent timidity.

The fact that the final determination of the question, as to whether particular laws impaired the obligation of contracts, devolved upon this Court, no doubt had its influence in causing the State courts to proceed with great caution in the enunciation of this principle. So we find, occasionally, that the earlier declarations of the law upon this subject are hedged about with qualifications, in some respects utterly incompatible with the principle that the police power of the government cannot be granted away by contract. We find these qualifications summed up in a single paragraph in Cooley's Constitutional Limitations, p. 577:

"The limit to the exercise of the police powers in these cases must be this: the regulations must have reference to

the comfort, safety, or welfare of society; *they must not be in conflict with any of the provisions of the charter;* and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."

In reference to the statement that the police regulations "must not be in conflict with any of the provisions of the charter," we submit that it is not the law, as settled by this Court. If the police regulations "must not be in conflict with any of the provisions of the charter," in any instance, what becomes of the doctrine that the power of the State to enact police regulations or laws, cannot be granted away or restrained by contract? Suppose the charter happens to contain something which in fact is in conflict with a police regulation subsequently enacted, which must give way, this clause of the charter, or the police regulation?

In *Stone* v. *Mississippi*, *supra*, there was a clear and unquestionable conflict between the provisions of the charter, which professed to give the right to maintain the lottery for a term of years, and the police regulation or law subsequently enacted, which forbade it. This Court gave effect to the police regulation, and held that it did not impair any valid contract contained in the charter, for the reason that "the power of governing is a trust committed by the people to the government, *no part of which can be parted with by contract.*"

In cases of this character, the only debatable question which can properly arise is whether the subsequent enactment of a law which comes in conflict with the provisions of the charter, is in reality an exercise of the police powers

of the State. If this point is ruled in the affirmative, the law, although subsequently enacted, must prevail over the provisions of the charter, because there can be no valid contract restraining the State from the exercise of this power. At the time of the preparation of Judge Cooley's work upon Constitutional Limitations, from which we have made the above extract, the principles involved had not been directly passed upon in this Court. The cases of *Beer Company* v. *Massachusetts*, and *Stone* v. *Mississippi*, *supra*, as well as *The Delaware Railroad Tax*, and *Boyd* v. *Alabama*, have been subsequently decided. If that learned jurist was writing upon this subject to-day, he would not be compelled merely to say: "It has also been *intimated* in a very able opinion, that the police power of the State could not be alienated, even by express grant. * * * "It would *seem*, therefore, to be the prevailing opinion, and based upon sound reason, that the State could not barter away, or in any manner abridge or weaken any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society."

Cooley's Const. Lim., pp. 282-3.

That which at the time this author wrote had been *intimated* to be the law, and upon such authorities as then existed *seemed* to be the prevailing opinion, based upon sound reason, has since been authoritatively declared to be the law by the highest court competent to speak upon the question. As a principle of constitutional law, it is now settled that a State Legislature cannot bind the State by contract not to exercise its police powers. It necessarily follows that such power may be exercised, even though it renders nugatory express provisions of prior acts of incor-

poration which come in conflict with the subsequently enacted police regulations.

3. The phrase, police powers of the State, as all the authorities agree, is but a mere conventional name for the powers of government inherent in every sovereignty, and includes the power of the State to pass all necessary laws for the government of men and things within its jurisdiction.

License Cases, 5 How., 589.

Munn v. *Illinois*, 94 U. S., 125.

City of New York v. *Miln*, 11 Peters, 102, 129.

If this power of government rightfully extends to any class of property, it must extend to that which the State, in the exercise of its sovereignty, has authorized to be taken for public use. While the ownership of such property may be vested in a private corporation, its use must ever remain public.

Olcutt v. *Supervisors*, 16 Wall., *supra*.

If, as this Court holds, "the power of governing is a trust committed by the people to the government, no part of which can be taken away," can a State Legislature, in the same act by which it authorizes property to be taken for public use as a highway, enter into a valid contract abdicating its power and absolving itself and its successors from the duty, to pass all necessary laws to protect the public from extortion and oppression in the use of such highway? Upon both reason and authority, the answer to this question must be in the negative.

The case of *Dartmouth College* v. *Woodward*, 4 Wheat., 518, which is so frequently cited in support of the doctrine that charter contracts cannot be impaired by subsequent

legislation, is, in fact, an authority against any such application of the principle there announced, as is here contended for by the counsel for the plaintiff in error.

Referring to, and quoting from, that case, this Court has recently said: "In *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat., 518, it was argued that the contract clause of the constitution, if given the effect contended for in respect to corporate franchises, 'would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances;' but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say, 'that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed.' The present case, we think, comes within this limitation."

Stone v. *Mississippi*, 101 U. S., pp. 819, 820.

We submit that the present case falls equally within the same limitation. The power which it is here claimed the State has bound itself by contract not to exercise, is the power to pass such laws as may be deemed necessary for the government and control of property taken under the sovereign authority of the State for public use. As was said by this Court in *Olcott* v. *Supervisors*, *supra*, "No matter who is the agent, *the function performed is that of the State.*"

The reasoning in the Dartmouth College case clearly excludes the idea that a State Legislature may enter into

an obligatory contract that no law shall be passed for the government of property, taken under the sovereign authority of the State, for public use.

In the opinion of Chief Justice Marshall (4 Wheat., p. 634), the following question is propounded:

"Are the trustees and professors public officers, in vested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from sovereign authority?"

In that case this question, in all its branches, could properly be answered in the negative.

It is otherwise here. The railroad corporation exercised the "sovereign authority" of the State to procure its right of way, professedly for public use, and to that end was invested with a "portion of political power"—indeed, one of the highest sovereign powers—and was an agency used "in the administration of civil government," viz., the construction of a public highway. Unlike the college, the railroad corporation exercised powers which could only be derived from the State in its sovereign capacity; in fact, it exercised a part of the sovereign power of the State, and "the function performed is that of the State."

It may be conceded that a railroad company may not be, strictly speaking, a public corporation, nor its officers public officers.

Nevertheless, this railroad corporation was constituted a common carrier, and as such common carrier pursues a public employment, "and exercises a sort of public office, and has public duties to perform."

Coggs v. *Bernard*, 2 Lord Raymond, 909.

New Jersey Nav. Co. v. *Merchants' Bank*, 6 How., 382.

Sanford v. *Railroad Co.*, 24 Pa. St., 381.

Munn v. *Illinois*, 94 U. S., 130.

C. & N. W. Ry. Co. v. *The People*, 56 Ill., 377.

If this is true of an ordinary common carrier upon whom no special privilege has been conferred, for stronger reasons is it true of a railroad corporation, called into existence to exercise the vocation of a common carrier, and to that end authorized to make use of the sovereign power of the State to condemn the right of way, and thus establish the public highway upon which it may ply that vocation.

4. There is certainly no less necessity that corporations, in the exercise of their vast powers, and possessing the insidious influence which necessarily springs from great aggregations of capital, should be held subject to the restraints of governmental authority, than exists in the case of natural persons. Through the agency of these corporations a very few men may, and in fact do, control and rule with imperial sway all the principal lines of railway in the country, the use of which has become an indispensable necessity to the public in the transportation of passengers and freight. The power thus wielded is almost incalculable. If the managers of these railroads are above legislative control, they have become the masters of the people.

It is, we submit, of the utmost importance that all the rightful powers of government to correct abuses by those to whom the management of these corporations is entrusted, should remain unimpaired, and be maintained in their full vigor. If there is any subject in respect to which all attempts to sell, barter away, or in any wise impose restraints upon the exercise of governmental power, should be held futile and inoperative, it is this.

Corporations exercising the powers of common carriers

should be held as strictly amenable to the law as natural persons performing the same functions. The authority conferred upon them by their charters to exercise certain callings, and carry on certain branches of business, should not be construed as giving a more unlimited or uncontrollable power in the premises than is possessed by a citizen or partnership firm, having the right to exercise the same calling, or carry on the same business.

Commonwealth v. *Intoxicating Liquors*, 115 Mass., 153.

Beer Company v. *Massachusetts*, 97 U. S., 25.

Bank of Republic v. *County of Hamilton*, 21 Ill., 53, 59.

C. & A. R. R. Co. v. *The People*, 67 Ill., 11, 18.

N. W. Fertilizing Co. v. *Hyde Park*, 70 Ill., 634, 643.

And since a natural person exercising the vocation of a common carrier is subject to legislative control in respect to his rates of charges, a corporation having authority to exercise the same vocation must be equally subject to the same law.

The idea that the managers of railroad corporations are vested with irresponsible and uncontrollable power in respect to matters of such great public concern, must impress every just mind as dangerous in the extreme.

It is unreasonable to assume that the people of any State ever intended to confer upon its legislature, power to invest a corporate organization, created to carry on business in their midst, with capacity so exalted that it should be superior to the citizen, and above the restraints of law.

The property rights of such an organization may be equal to those of the citizen, but they cannot be greater. The contract rights of such an organization may be equal to those of the citizen, but they cannot be greater. All the

rights which either possess, must ever be held equally subject to the proper exercise of governmental authority.

Neither can be absolved therefrom by contract, because the powers of government cannot be granted away by contract.

If the State has power to govern anything within its jurisdiction, such power must extend to artificial creations or corporate bodies, spoken into existence by its authority. The right of the creator to govern the thing created cannot well be denied.

5. Neither the State nor the National Constitution should be so construed or administered as to work the destruction of the very governments they were ordained to establish and make perpetual. Under our present Constitution, the existence of the State governments with all their proper powers unimpaired, is essential to the continued existence of the National government. The State governments not only form the basis, but constitute an essential part of the frame work of the National government. Strike down the States and there can be no United States.

It cannot be, therefore, that when the framers of the Constitution of the United States inserted therein the provision that "No State shall * * pass any * * law impairing the obligation of contracts," it was designed or anticipated that the same would be perverted into an authority to State Legislatures to sell, or bind themselves by contract not to exercise their legislative or other proper powers of government. The competency of State Legislatures to make particular contracts is wholly unaffected by this provision.

If the undertaking, or enactment by a State Legislature, claimed to be a contract, never in fact constituted a valid

contract perpetually obligatory upon the State, by reason of want of power to make such a contract, then the same can receive no support or protection from this clause of the Federal Constitution.

And inasmuch as the State Legislature has no power to enter into a contract binding the State not to exercise its powers of government, no undertaking of this character can properly receive any support or protection from this provision of the Constitution.

We have elsewhere shown, upon the authority of this Court, that the enactment of laws to prevent extortion and prescribing maximum rates for the transportation of passengers and freight upon railroads, is a proper exercise of legislative power. In other words it is one of the powers of government inhering in each of the States. This being so, the enactment of such laws cannot impair the obligation of any contract, because no valid contract could ever have been made depriving the State of power to enact such laws.

There is an obvious distinction between a law and a contract. Laws are enacted by, or in virtue of sovereign authority. Contracts may be entered into by competent parties, not possessing any such authority.

Governments are organized to the end that they may exercise sovereign governmental powers for the protection and well being of society. The making of contracts is not one of the purposes for which governments are created. At most, it is but a mere incident to the sovereign powers of the State. The proper exercise of the sovereign powers of government is the chief end of the existence of every State, and its implied or incidental power to make contracts must be held subordinate thereto.

By virtue of the former the State enacts laws. Through an exercise of the latter it makes contracts.

It is unreasonable to hold that a State Legislature, by an exercise of this incidental and subordinate power to make contracts in behalf of the State, can divest the State of its principal and sovereign power to enact laws.

In such case, as well as in the case of a natural person, there are certain well understood limitations upon the power to make valid contracts.

A natural person, possessing all the powers of a citizen, cannot by contract confer upon another the right to deprive him of life or limb, or the right to do any act which would unnecessarily endanger either.

Upon the same principle, and for stronger reasons, a State Legislature cannot, by virtue of its authority to represent the State in making contracts in its behalf, enter into a valid contract whereby it would divest the State of its inherent sovereign power to enact laws for the government of those within its jurisdiction. The incidental and subordinate power to make contracts, can neither absorb nor destroy the principal and sovereign authority to enact laws. The less cannot include the greater.

The General Assembly of Illinois had authority to exercise, but not sell, the legislative powers conferred upon it. Each successive General Assembly convenes with as full a measure of legislative power as its predecessors. To hold that legislative power may be the subject of barter and sale by the representatives of the people, would be destructive of government. It would ultimately force upon the people the necessity of revolution to regain such power.

JAMES K. EDSALL,
JOHN B. HAWLEY,
Counsel for Defendant in Error.

108-541

OFFICE SUPREME COURT U. S.
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APR 12 1883
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1882.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

Error to the Supreme Court of Illinois.

Brief and Argument for Defendant in Error.

By JAMES McCARTNEY,
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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

ARGUMENT OF JAMES MCCARTNEY, ATTORNEY-GENERAL OF ILLINOIS, FOR DEFENDANT IN ERROR.

This action was originally brought on behalf of the State of Illinois, through the Attorney-General, against the Illinois Central Railroad Company, in the Circuit Court of Douglas county, Illinois, claiming $100,000 debt and $5,000 damages.

The declaration alleged that on the 1st day of March, 1873, the defendant was the owner of and operating a railroad lying wholly within the State of Illinois—running from Galena and Chicago to Cairo, Illinois, through Douglas county. That on the day aforesaid Messrs. Moody & Russell, a firm doing business in said State, shipped five barrels of beans weighing 1170 pounds, from Chicago to Tuscola, for which the defendant

charged, collected, demanded and received $4.45, the same exceeding a fair and reasonable toll and compensation to the amount of 83.4 cents and the said charge was therefore unjust, unfair, unreasonable and extortionate, contrary to the form of the statute, etc.

The second count of the declaration charges extortion in the charges for the carriage of various articles of freight for the same parties between the same places to the amount of $1.67.

The third count charges extortion in charges for the carriage of certain other freight for the same parties between the same places, to the amount of $3.55

The fourth, fifth, sixth and seventh counts of the declaration are similar to the third. The eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth counts charge extortion in carrying freight between the same points for Lawson Brothers, amounting to various sums.

The seventeenth and eighteenth counts charge extortion in charges for carrying various articles of freight between the same points for John M. Maris.

The nineteenth count charges extortion in charges for carrying fifteen barrels of sugar from Tolono to Tuscola on said road, amounting to $1.60.

The twentieth count charges extortion in the charges for carrying two barrels of coal oil from Champaign to Tuscola, amounting to 60¼ cents.

The twenty-first count charges extortion in carrying three half chests of tea from Tolono to Tuscola for John M. Maris.

The twenty-second, twenty-third and twenty-fourth counts charge extortion in the charges for the carriage of freight from Chicago to Arcola for Patrick H. Monahan, amounting to various sums.

The twenty-fifth count charges extortion in the carriage of certain freight from Arcola to Mattoon for Patrick H. Monahan, amounting to $1.16-78.

The twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth counts are charges of extortion for carrying freight for different persons from different points.

The thirty-first and last count is for an unjust discrimination in the charges made for carrying freight between Mattoon and Arcola—having charged Patrick H. Monahan $3.35 or 15 249-159 cents per hundred pounds for carrying two crates of earthenware goods between said points, and having charged Coffin & Seymour $7.75 or 14 10-11 cents per hundred pounds for carrying five crates of earthenware over the same road between the same places upon the same date, contrary to the form of the statute, etc.

The case was submitted for trial in the Douglas Circuit Court before the Hon. O. L. Davis, Circuit Judge, upon an agreed state of facts.

It was agreed by counsel on both sides that under the seventeenth count in the declaration defendant charged $28.35 for carrying 70 barrels of salt from Chicago to Tuscola; that the maximum rate fixed by the Railroad and Warehouse Commissioners of Illinois for such carriage was $24.80, as established by their schedule of rates in force before the transportation of said salt, which schedule was made under and by authority of an act of the legislature of Illinois, approved May 2, 1873, and in force July 1st, 1873, and it was agreed that this admission shall have like force and effect as, if the schedule in question had been read on the trial of the case.

It was further agreed that the sum charged by said railroad company was $3.55 more than the maximum rate fixed by said Commissioners: That said Commissioners have classified the different railroad companies of the State and have established rates; that the rates *charged* by the railroad company in this case was the rate fixed by the directors of the company in conformity with the provisions of its charter; that the charter of the Illinois Central Railroad Company is admitted in evidence; that the defendant claims the right to fix its tolls under its charter and claims that the acts of the legislature of the State of Illinois of April 7, 1871,

and May 2, 1873, to prevent extortion and unjust discrimination are in conflict with the rights given by the charter granted to the railroad company, and with the constitution of the State of Illinois, and is repugnant to that section of the constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts.

It was agreed that if the court should find for the people, a judgment for $1000 should be entered against the defendant. The Court found for the people, and a judgment was so entered by the Court, and an appeal taken by the railroad company to the Supreme Court of the State of Illinois, where the judgment of the Court was affirmed.

The decision of the Supreme Court of Illinois is found in 95 Ill., page 331.

The opinion was written by a judge who dissented from the decision of the majority, and as a natural consequence, it can not be very valuable to counsel, or any one else, wishing to learn the full reasons the Court entertained in sustaining the judgment of the Court below.

Through the method of distribution of causes between the judges in Illinois, in which opinions are to be written, it sometimes falls to the lot of the judge, to write the opinion in a case when he does not concur in it himself. Unfortunately for us, this was the case here.

Under the agreed state of facts, all that is necessary to look at in this case is the cause of action, stated in the seventh count of the declaration. That count is for charging John M. Marris $28.35 for hauling seventy barrels of salt from Chicago to Tuscola, while the maximum schedule rates, as fixed by the State Railroad and Warehouse Commissioners, for hauling this amount of pounds of that class of freight, the distance carried in this instance, would be $24.35, or an excess of $3.55, charged by the company over and above the maximum schedule rates.

No objection is made to the manner in which the charge is made in the declaration and the facts are admitted.

We are compelled to anticipate the grounds upon which a reversal of this decision of the Supreme Court of Illinois will be asked for, as we have been furnished with no brief or points to be made by opposite counsel until too late for much use in the argument.

We presume that the points that will be relied upon are the same as those stated in the seventh clause of the stipulation, viz: That the law fixing or authorizing a commission to fix rates of maximum toll for the carriage of freight, is a violation of and in conflict with the part of Sec. 8 of the charter of this railroad company which provides that,

"The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same, as they shall from time to time, by their by-laws, direct and determine, and to levy and collect the same for the use of said company."

This case is almost identical with that of *Neal Ruggles* v. *The People of the State of Illinois*, No. 135 of this term. The principal difference being that the Ruggles case was for extortion in the charges made for carrying passengers, and in this case is for extortion in charges made for carrying freight. The difference in each, however, being so slight, so far as the underlying principle is concerned, that the argument in the one case will apply very properly in the other, so far at least, as the question of the chartered rights of the company and the impairment of contracts is concerned.

In arguing this case, I shall ask the Court to consider the arguments in the Ruggles case as a part of the argument in this, and I shall try not to repeat anything said in that case. I shall have to urge, however, the fullest consideration by the Court of the questions involved in these two cases, as I believe the decisions in them will fix, for all time to come, the status of corporations in this country, concerning the State governments and the people.

There appears to be, at the present time, a struggle as to whether corporations or the States shall be supreme, and in all these cases the Supreme Court of the United States is called in as an arbiter to decide between them. It does seem a little humiliating to us that a great State, as

large in territory and population and as great in wealth as some of the oldest of the kingdoms of the old world, should be compelled to go into a court of the United States to learn whether she, or a creature of her own creation, is the greater. But such is the case here, and the authority for it is so well settled that we do not expect now to overturn it.

We do expect, however, that this Court will be convinced beyond any reasonable doubt, that the decision is manifestly wrong, before it will reverse a decision of the highest court in a State, upon a subject entirely between the State and one of its own citizens and subjects, upon a construction of its own laws.

In this case it is a corporation brought into being and endowed with life by the State, that is claiming superior rights over all other laws of the State except the one that brought it into being.

I do not think I am violating any principle of professional courtesy, or exhibiting any disrespect, when I say that Illinois courts are competent, and it looks reasonable that they should be permitted to settle the relations of the creature with the State that created it. I admit the exalted wisdom and great ability of this court, but insist that it should be satisfied beyond a reasonable doubt that the courts of the State, in such a case as this, have been influenced by passion or prejudice, or have arbitrarily violated some unquestioned and well settled rule of law, before it is justified in setting aside the judgment of the State court. In this case we have a railroad company created by the State, endowed with life by it, given a being, a substance, an existence by the State, now resisting and combating the laws of its own creator. Having failed in successfully resisting these laws in the courts of the State, it appeals to the Federal Court to aid it in overriding the State laws. It surely is not asking too much to urge that it should present an extraordinary case of oppression or wrong before the Federal Court will step between, and hold, in effect, that a great State has been doing a wrong and injustice. In 1851 a few gentlemen from New York and Boston modestly begged the General Assembly of Illinois to incorporate them as the Illinois Central Railroad Company, promising that if it would do so, they would build a railroad,

etc. In accordance with their request the General Assembly did so incorporate them, and thus gave the corporation being and vitality.

I copy below the application made by these men, believing that it will be of value in showing the relations which this company should bear to the State of Illinois.

"*To the Honorable the Senators and Representatives of the State of Illinois, in General Assembly convened:*

"The memorial of Robert Schuyler, George Griswold, Gouvenour Morris, Jonathan Sturgis, George W. Ludlow, and John F. Sanford, of the city of New York, and David A. Neal, Franklin Haven and Robert Rantoul, Jr., of Boston and vicinity, respectfully represents:

"Having examined and considered an act of Congress of the United States, whereby land is donated for the purpose of insuring the construction of a railroad from Cairo, at the mouth of the Ohio, to Galena and the northwest angle of the State of Illinois, with a branch extending to Chicago on Lake Michigan, on certain conditions therein expressed, and having also examined the resources of the tract of country through which it is proposed that said railroad shall pass, and the amount of cost and space of time necessary to construct the same, the subscribers propose to form a company with such stockholders as they may associate with them, including among their number persons of large experience in the construction of several of the principal railroads in the United States, and of means and credit sufficient to place beyond doubt their ability to perform what they hereinafter propose, make the following offer to the State of Illinois for their consideration:

"The company so formed by the subscribers will, under the authority and direction of the State of Illinois, fully and faithfully perform the several conditions, and execute the trust in said act of Congress contained; and will build a railroad, with branches, between the termini set forth in said act, with a single track, and complete the same ready for the transportation of merchandise and passengers on or before the 4th day of July, which will be in the year of our Lord 1854.

"And the said railroad shall be in all respects as well and thoroughly built as the railroad running from Boston to Albany, with such improvements thereon as experience has shown to be desirable and expedient, and shall be equipped in a manner suitable to the business to be accommodated thereby.

"And the said company, from and after the completion of said road, will pay to the State of Illinois, annually, —— per cent. of the gross earnings of said road, without deduction or charge for expenses, or for any other matter or cause: *Provided*, that the State of Illinois will grant to the subscribers a charter of incorporation, with terms mutually advantageous, with powers and limitations as they in their wisdom may think fit, as shall be accepted by the said company, and as will sufficiently remunerate the subscribers for their care, labor and expenditure, in that behalf incurred, and will enable them to avail themselves of the lands donated by the said act, to raise the funds, or some portion of the funds, necessary for the construction and equipment of said road."

This was the beginning of the corporation now called the Illinois Central Railroad Company.

The application to be incorporated and asking that special privileges be given them, came from those who afterwards formed the company. It was a favor asked by themselves—not one sought by the State.

In accordance with this general request the General Assembly of the State of Illinois, on February 10, 1851, granted a charter, which is incorporated in full on page 28 of the printed record in this case.

By section 3 of this act the said company was given the right of way through the whole State two hundred feet wide. They were allowed to enter upon and take possession of and use all lands, streams and materials of every kind for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All and any of these things belonging to the State were given, without cost or charge of any kind, and if they belonged to individuals or corporations and could not be obtained by voluntary grant or lease, the same might be taken and the value fixed under a general law.

By section 15, the State granted to the company the lands granted by Congress to the State. Under this grant the company obtained nearly three million acres of the richest and best lands in the world, worth, it is said, to the railroad company in the aggregate $20,000,000.

In addition to this, the company was granted the right of way, which the State of Illinois had theretofore obtained, along the line of the road. Also, a lot of ground in Cairo for a depot, etc., and all the grading, embankments, excavations, surveys, work, materials, personal property, profiles, plats, and papers constructed, procured, furnished and done by or on behalf of the State, under a previous contract with another company. The work that had been done upon the line by former companies was estimated to be worth, in the way of embankments, rights of way, depot

grounds, etc., several million dollars. At least they had cost the State a very large amount of money—about $3,500,000.

In addition to this, it was declared that the lands granted the company should be exempt from taxation until sold, and all the other property of the company of every kind and nature should be exempt from all taxation for six years from the passage of the act.

Many other favors and perquisites were granted the company besides those enumerated. Historians of Illinois have often painted the profits arising to the persons who projected this railroad, which seemed to be as productive of wealth as the famed lamp of Aladdin.

On page 582 of the History of Illinois, by Davidson and Stuvé, we find this paragraph:

"As an instructive example of how money may quicken other property into manifold life, scattering its gains in many unexpected directions, the Illinois Central Railroad is a subject in point. This work was one of the most stupendous and ingenious speculations of modern times. By means of it, a few sagacious capitalists became the owners of a first-class railroad more than 700 miles long, in full running order, complete in rolling stock and every equipage, and millions of acres of land worth in the aggregate perhaps $40,000,000, without the actual outlay of a cent of their own money. This project was among the first to illustrate the immense field there was opening up in this country for bold and gigantic railroad operations by capitalists, and as contrasted with the State internal improvement scheme of 1836–7, it was furthermore an example of the superiority of private enterprise over State or governmental undertakings. The State, at that time, with a population of 350,000, mostly small farmers, authorized a loan exceeding $ 0,000,000 to construct public works. One of these was the Central railroad, upon which a considerable sum was expended. Hard times and a general collapse followed in rapid order. Now, with this grant of land from the general government, not far short of 3,000,000 acres, with a belt of fifteen miles along the route of the road, to aid in its construction, these gentlemen, backed by credit and capital, step forward, propose to take the lands and build the road, which is to belong to them when built. The State accepts the offer, incorporates the gentlemen's scheme by perpetual charter, and endows them with this munificent domain and all the property and remains of the old Central road. After the road is put in operation, the company pays the State annually 7 per centum of its gross earnings in lieu of all taxes forever.

Having acquired a vested right the State has no other than police control over the company." * * * *

"The minimum valuation of the lands acquired, as soon as the road should be completed, was $20,000,000, exceeding by $6,000,000, the cost of the road, estimated at $20,000 per mile, which in Illinois was liberal, because she presented the most uniform and favorable surface for

the construction of railroads of any other State in the Union. Two-thirds of the land was stipulated as security for the principal of the construction bonds, 250,000 acres to secure the interest fund and the remainder as a contingent fund. The construction bonds formed ready sale at par, and built the road. The land sales yielded interest to set off in part the accruing interest on the bonds. The redemption of the bonds completed, the road and all its appurtenances remains the property of the fortunate gentlemen who had the sagacity to see how it could be built without costing them a cent."

This historical statement of how the road in question was built, is made by those who had no interest in misrepresenting the facts, and their statement must be presumed to be correct.

With reference to that portion of the charter which provides for the payment of seven per cent. of the gross earnings of the road into the State Treasury, the same authors say on page 580 of their History:

"It will be remembered that the memorialists, in their proposition to the legislature to obtain the charter, offered among other things, to pay the State of Illinois, annually, a certain per centum of the gross earnings of the road, without deduction for expense or other cause. The amount left blank, to fix which, however, became subsequently a matter of no little scheming and trouble."

"In the first gush of desire to obtain the splendid grant of land from the State, it is said, the corporators would have readily consented to fill this blank at 10 per centum of the gross earnings. But unfortunately for the tax-payers and the treasury of the State, as is charged in the press of the day, the shrewd capitalists employed a gentleman as their attorney—a citizen of Illinois and a member of Congress, at the time, than whom none was more popular and wielded a greater influence at home—an orator, statesman and soldier of renown—who had within the year emerged from an affair of honor with no little eclat, and which gained national notoriety—who left his seat in Congress and attended, at Springfield, in the capacity of a lobbyist for the company, and the result was the State conceded a deduction of 3 per cent. from that figure, the amount being fixed at 7 per centum, and that in lieu of all taxes, State or local. The gross earnings of that corporation now amount to about half a million dollars annually. No little effort has been made to get rid of the payment of this percentage into the State treasury, but since the lands turned over to the company have yielded so well in price, repaying the cost of the road perhaps twice over, the people set their faces against it, and have been exercised by no little anxiety that this now wealthy corporation would succeed in buying up enough members of the legislature at some future session to relieve it of this percentage. To satisfy the popular clamor a limitation has been irrevocably fixed in the organic law of 1870, which places the subject beyond the control of further legislative meddling, and the public anxiety is allayed."

The foregoing historical statements give very clearly the facts concerning the early organization of the company. Previous to 1851 when this company was incorporated, many other railroad charters had been granted to the State. The first legislation we find concerning railroads was in 1831, when a board of three commissioners was authorized to be appointed to examine and provide for the building of a canal connecting the lakes and the Illinois river.

By section 14, page 43, laws of 1831, it was provided that—

"It shall be the duty of the superintending commissioner to cause the engineer employed by him to ascertain, as early in the spring as the weather will permit, whether the Calamic will be a sufficient feeder for the part of the canal between the Chicago and Des Plaines rivers, or whether the construction of a railroad is not preferable, or will be of more public utility than a canal. And if the commissioners shall be satisfied of the sufficiency of said river and that a canal will be of more public utility than a railroad, it shall be their duty to commence the excavations without delay."

It was decided that a canal would be of more public utility and the canal was built.

At this time, and subsequently, it was the belief of the Illinois legislators that no canal, road, ferry, or bridge company could collect tolls for the use of improvements made by them unless such power was specially given in the charter. This we know from the fact that every charter granted for such purposes contains special authority to collect tolls. This authority was sometimes given in one way and sometimes in another. In some cases the act declared how much tolls should be collected for the passage of each sort of vehicle or person; in others it was provided that the tolls should be fixed by the officers, not to exceed such a percentage of the capital stock, and in some cases the amount was not limited.

In all, about eight hundred railroad companies have been specially chartered by the General Assembly of Illinois, and it may be generally said that in each charter there is a provision for the collection of tolls, and the power is given to the company or some of the officers thereof to fix the rates of charges for fares and the carriage of freight. The words used in the original charter of this road are very little different in terms,

and none in meaning, from the words used in the charters of all the other railroads granted by the State. The words used upon which the defense in this suit is based, are found in section 8 of the law of February 10, 1851, which law is claimed to be the charter under which the present Illinois Central Railroad was built and under which it is now being operated.

The section is as follows :

Sec. 8. "The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interests of the company; provided, that the same be not repugnant to the constitution and laws of the United States, or repugnant to this act. *The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall, from time to time, by their by-laws direct and determine, and to levy and collect the same for the use of said company.* The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall, from time to time, determine. Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city."

Is it possible that the General Assembly of Illinois, in all the eight hundred private and special charters which it has granted to railroad companies, intended to give the sole and unrestrained power to the corporation or its officers to fix such rates of toll as they might see fit? The mere statement of the proposition should be an ample refutation of it. It can hardly be possible that the legislature intended to enter into a contract with eight hundred corporations that the officers of these corporations might build railroads running through every town, village and city in the State, upon which should be carried the products and people of the whole country for all time to come, and that they should be absolutely free and independent of all legislative control.

Before we can *consent* to such a dangerous and destructive admission as this we should scrutinize most carefully the act in all its parts, and be absolutely certain beyond any reasonable doubt that such was the intention.

It will be seen that the same persons who signed the petition to the legislature of Illinois asking to be incorporated as the Illinois Central Railroad Company, and asking for the special privileges therein set forth, were in fact so incorporated, with the addition of Henry Grinnell, William H. Aspinwall, Leroy Wiley and Joseph Alsop, added to those signing the petition. It has been universally held that when special privileges are granted by a legislature upon the application of the grantees, the special privileges conferred shall be construed more strictly in favor of the State and against the grantees, than in other cases.

The seventeenth rule of construction laid down by Domat, is applicable to the act in question. He says:

"The grants and gifts of sovereigns are to be favorably regarded, and to have that extension to which they are entitled from the natural presumption of princely liberality, *provided, however, that they are not to be so liberally construed as to injure other individuals.*"

The converse of this proposition is, that if a liberal construction is indulged in, or if the gift being favorably regarded would result in injury to other individuals, then a strict construction must be had, or in other words the gift or grant must *not* be favorably regarded, because it cannot be presumed the sovereign intended to grant a power upon one individual that might injure other individuals.

Professor Lieber, in his Legal and Political Hermeneutics, page 144, lays down this rule:

6. Privileges or favors are to be construed so as to be least injurious to the non-privileged or unfavored."

* * * * * * *

10. "The effects which would result from one or the other construction, may guide us in deciding which construction we ought to adopt."

Another rule, laid down by one of the ablest law writers of the times when men learned the law from reason and common sense, and not from pursuing impractical theories, through all the inscrutable realms of metaphysical mistiness, was:

"Since the sole object of the lawful interpretation of the deed ought to be the discovery of the thoughts of the author or authors of that deed,

whenever we meet with any obscurity in it we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly."

Vattel's Law of Nations, § 270.

It is true this rule of construction was applied by Vattel more especially to the construction of treaties, but it is true of all other writings.

He says further, in the same section:

"This is the general rule of all interpretations. It particularly serves to ascertain the meaning of particular expressions whose signification is not sufficiently determinate."

Another rule laid down by the same author may have much application here, and is found in § 287, Id.

"The reason of the law or treaty—that is to say, of the motive which led to the making of it, and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to a particular case. When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone."

In Sec. 294 he says:

"When a case arises in which it would be too severe and too prejudicial to anyone to interpret a law or a promise according to the vigor of the terms, a restrictive interpretation is then also used, and we except the case in question agreeably to the interpretation of the legislature, or of him who made the promise; for the legislature intends only what is just and equitable; and in contracts no one can enter into such engagements in favor of another as shall essentially supersede the duty he owes to himself."

In Sedgewick on the Construction of Statutory and Constitutional Law, page 194, the author says:

"Where a statute appears to be of a doubtful meaning the courts have the power to construe it. In discharging this duty, the first thing is to have a clear idea of the object in view. What is doubtful? The answer evidently is, *the intent of the legislature* who passed the act. What did the legislature in fact intend? * * * * * * * We may, therefore, affirm, as a general truth, that independently of constitutional questions, and independently of those doctrines of liberal and strict construction which really, as I have said, vest a sort of legislative power in the judge, the object and the only object of judicial inves-

tigation, in regard to the construction of doubtful provisions of statute law, is to ascertain the intention of the legislature which framed the statute."

The doctrine is well laid down in the case of People v. Utica Insurance Company, 15 Johnson's Rep. 358,on page 380, through Chief Justice Thompson. The court says:

"That in construing a statute, the intention of the legislature is a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention, however, is to be collected from the act itself, and other acts *in pari materia*. It may not, however, be amiss to state, and keep in view, some of the established and well-settled rules on this subject.

"Such a construction ought to be put upon statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion, in the construction of the statute, although such construction seem contrary to the letter of the statute."

Blackstone says, in Vol. 1, page 61, of his Commentaries, after laying down several other rules:

"5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it."

But these principles of construction are so universal and so well understood that it is not necessary farther to refer to them. All we need to do is to apply them to the act in question.

Let us apply these rules here, remembering that the construction of all doubtful questions in this case must be in favor of the State, and against the railroad company, or in more apt words, if there is a doubt whether any power is given in the charter to the company, then the power is not given; that in all cases, in constructing legislative grants nothing doubtful can be granted; all doubts must be resolved in favor of the grantor.

With these rules continually in view, let us proceed to construe the charter in question.

The words of the section in controversy may be again repeated, that we may have it fresh before us. They are—

"Sec. 8. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interests of the company: *Provided*, that the same be not repugnant to the constitution and laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall, from time to time, by their by-laws, direct and determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said board of directors shall from time to time determine."

Eliminating the unnecessary words from the section we have the following powers granted.

"The company have power to make such rules as may be deemed necessary to carry into effect the provisions of this act, and for regulating the business of the company: *Provided*, they shall not be repugnant to the constitution or laws of the United States, the State of Illinois, or the provisions of this act."

"The directors shall have power to *establish* such rates of toll as they shall by their by-laws direct, and to collect the same for the use of the company."

"The transportation of persons and property, and all other matters and things respecting the use of the road, and the conveyance of persons and property, shall be in conformity to such rules as the board of directors shall determine."

From this synopsis of the powers granted them, we find that the following powers are clearly granted, and about which there can be no controversy:

First, The company have power to make rules to carry into effect the provisions of the act.

Now, when it is said, "the company shall have power, etc.," whom do they mean?

In Sec. 1, of the charter, it is said that, "Robert Schuyler, George Griswold, etc., and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be a body politic and corporate, by the name and style of the 'Illinois Central Railroad Company.'"

Then, when the act provides that "the said company shall have power to make such by-laws," etc., it would mean that Robert Schuyler, George Griswold, etc., and the stockholders in the company shall have the power to make by-laws, etc. From this construction, the whole company would have to exercise this duty of making by-laws, rules and regulations, to carry into effect the provisions of the act.

It is generally understood that the reason why the power to build and operate these public highways, such as turnpikes, ferries, bridges, canals, and railways, is conferred upon private corporations, is because the machinery of the government is too cumbrous and unwieldy to properly construct and manage them, and it is therefore given to fewer persons with more flexible powers, who devote their attention to the one individual subject which they are created to accomplish. But this purpose would be defeated, and the same objections would exist, if all the stockholders of a company, which might include all the inhabitants of the State and many from other States, were required to be present and assist directly in making the necessary by-laws, etc.

To avoid this contingency, Sec. 5 of the charter provides that:

"All the corporate powers of said company shall be vested in, and be exercised by a board of directors, and such officers and agents as they shall appoint."

One of the express corporate powers, as we have seen, is "to make, ordain, and establish all such by-laws, rules and regulations, as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interests of the company."

Section 7 of the charter further confirms and asserts this power, by providing that—

"The president and directors for the time being are hereby authorized and empowered, by themselves, their officers or agents, to execute all the powers herein granted, for the purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches; and for the transportation upon the same of persons, goods, wares and merchandise, with all such powers and authority for the control and management of the affairs of said company, as may be necessary and proper to carry into full and complete effect the meaning and intent of this act."

It appears from these provisions, that it was intended that this board of directors should have the power to act for the company in all cases where action was necessary. Full and ample power by these provisions was given to the board of directors. Section 5 provides that the board should consist of not less than twelve stockholders, the Governor of the State of Illinois being one.

Then we have this proposition settled: that the company, *i. e., the directors, have power to make rules to carry into effect the provisions of the act.*

What are the provisions of the act? One of the provisions is, that they shall "survey, locate, construct, complete, alter, maintain and operate a railroad from the southern terminus of the Illinois and Michigan canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa."

Another provision of the act is, that when all this is accomplished, when the road is "surveyed, located, constructed, completed, altered, maintained and operated," that tolls may be collected off passengers and freight for the use of the same.

In the middle of Sec. 8 then comes the provision of the act concerning tolls:

"The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall from time to time, by their by-laws, direct and determine, and to levy and collect the same for the use of the said company."

This is clearly one of "the provisions of the act."

The power to collect tolls must be specially conferred. The general authority to build and operate a railroad does not include the power to collect fares or tolls for the use of the same. This proposition was admitted in the Ruggles case, and the authorities there given settle the question. It was, then, one of the *necessary provisions* of this act that this power should be conferred as it was intended that it should be exercised. The legislature did so confer this power in the latter clause of the paragraph just quoted from section 8, viz: "and to levy and collect the same," *i. e.*, the tolls, "for the use of said company."

The other clause of this sentence is the one that troubles us here, viz:

"The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall from time to time, by their by-laws, direct and determine."

The power to "establish" is clearly given, and the subsequent words "from time to time" imply the right to change and re-establish such tolls when the board of directors see fit to do so.

This we may admit, that the directors are given the power, as one of the provisions of the act, to establish, alter, change and re-establish the rates of toll for the carriage of passengers and property upon their road as they may choose. This power, however, is controlled and limited by another clause in the same section; the words, "Provided, that the same be not repugnant to the Constitution and laws of the United States, or of this State, or repugnant to this act."

These are words of limitation upon some power, and we must look to the context to learn what they are a limitation upon. We find that the words "the same" in this proviso refer to "all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business and interests of the company."

Is not establishing the tolls "a provision of the act?" Is not establishing tolls, "regulating and securing the affairs, business and interests of of the company?"

These are the very things the proviso declares, the laws concerning, shall not be "repugnant to the Constitution or laws of the United States or of this State."

We find, then, that the power to collect tolls must be conferred specially. This is so conferred in the latter portion of the sentence now being discussed, in the words, "and to levy and collect the same for the use of the said company." But if the power had been given to collect and levy the tolls without any other provision, there would have been no power having authority to fix or establish the tolls, or to designate how much tolls should be collected.

It is believed this power existed alone in the State. This was a public highway, that was being used and controlled by a private corporation but for the public benefit, so far as all persons were concerned, except the corporation so using or operating it. Both the power to establish, and collect tolls upon public highways, were government franchises. The government, then, expressly conferred both these franchises upon the board of directors of this company, as they by their by-laws might determine.

The power to "*establish tolls*," then, was one of the "provisions of the act," and it was a *necessary* provision, as much so as the power to levy and collect. If this be true, then by the previous provision of the same section the by-laws "*establishing*" the tolls must not be repugnant to the constitution and laws of the State of Illinois. It may be argued that the proviso having been placed in the section *after* the provision giving power to the company to make, ordain and establish all such by-laws, etc., and before the power given to establish and collect tolls, that it was the intention that the proviso should apply only to the power given to the company, and not to the power given to the directors to establish tolls. But it must be construed by every fair mind that the words in the opening of the sentence "The said company" mean the *board of directors* of

the said company, for we find that the power is given the board of directors to make by-laws by sec. 5, in the words "All the corporate powers of said company shall be vested in and exercised by a board of directors," etc., and where the words "company" and "board of directors" are used afterwards they must be taken to be synonomous, or rather, where it is declared that the "company" shall do any act, it means the company shall do the act by or through its board of directors.

Therefore, the meaning of the sentence is undoubtedly that "The said company through its board of directors shall have power to make, ordain," etc.

When the legislature, then, came to the matter of granting authority to establish and collect tolls, they provided that it should be done through by-laws made by the board of directors as in other cases. It will be seen also that all matters for "the well ordering, regulating and securing the affairs, business and interests of the company" should be done through by-laws made by the company through its "board of directors," and that these should not be repugnant to the constitution and laws, etc.

The powers granted in the first part of the section are general, including all purposes or means necessary to carry into effect the provisions of the act generally, and it was provided that the by-laws to carry out these provisions should not be repugnant. Then follows the specific provision in reference to tolls after the proviso, and it is contended that the proviso was not intended to apply to this matter of tolls, because it was placed before it. Can any reason be shown why the general powers granted are specifically placed subject to the laws and constitution, and the special powers not?

Are the by-laws made for general purposes subject to the laws and constitution of the State, and the by-laws made for specific purposes not so subject?

Again, it is argued that when a power is granted to do an act, it implies that the power shall be exclusive, and hence the power conferred in this case on the board of directors to establish tolls, necessarily implies

an *exclusive* power so to do. It is admitted that this is true, so far as persons are concerned, but not true as to the State. That the granting of the power to the directors of the company to establish tolls, gives the board of directors this power to the exclusion of any other party or parties, is admitted. But it does not exclude the State—the granting power—from exercising it, or directing its exercise. We take the position in this case, that the act in question gives this board of directors the sole and exclusive power to establish the rates of toll upon this road against the whole world, except the State of Illinois. But that the State has by so doing parted with any of its control over the power, or its right to resume the power, we deny. I take the position that the government can not permanently part with any of its governmental powers; that the right to protect its citizens from wrong and injury; the right of eminent domain, which is really included in the right to protect from injury; and the right of police, cannot be parted with, as they are fundamental and essential powers, without which the government can not exist. The power of protection and the right to protect, in fact, cover all the other powers, and they are all included in them. The right to regulate the charges made by a railroad company is simply the right to *protect one* portion of the inhabitants of a territory against the encroachments and oppression of another portion, and the argument that the government can part with this power of protection is absurd. It can part with this power as to all other persons and corporations but itself. It can make the power to charge and establish charges, exclusive and individual, as against all other powers but that of the State. But as to the State it must be retained, or the government of the State is given into the hands of the individual.

It was urged in the argument in the Ruggles case that the government can and does contract away some of its franchises, and the taxing power is pointed to as an illustration. It is said this Court has held that a State government may part with its power to tax, and many cases are cited where this has been so held. It is true that this Court has done so, but it is believed, that if this was a new question now first brought before the Court, that it would not be so held again. But it having been so de-

cided by the Court many years ago, when it was not suspected that corporations would ever reach the magnitude of power to which they have attained in these days, this Court was constrained to follow the precedent established, as many and very important property rights had then grown up under it.

But while this is true, there is, it is believed, a vast difference between the effect which the deprivation of the power of protection and the power of taxation would leave upon the government. The power of protection is the sole and only ground upon which government can be supported; the power of taxation is the mere incident, the sustaining principle, upon which the government feeds after it has been created. Protection is the life of the government; taxation is the food that supports and sustains life. The life can exist for a long time without support, without a tax; but take away protection, the principle of life itself, and everything is ended, and only the corpse is left.

Governments were created, and exist solely and only, for the purpose of giving protection to the governed. When the purpose of their creation is parted with, government ends, and death follows. But as a man may live without food, so the government may live without support—without taxation. It is true it will finally succumb without necessary support, but, it is presumed, when it is parted with in certain instances, the necessary support will be provided from other sources, and in no case will the entire sustaining principle be contracted away. In the cases where it was held that the taxing power might be parted with by the State, in no instance was the whole tax of the State parted with. Enough was left to support the government. If the *whole* tax had been contracted away another question would have arisen, and it is believed, precedent or no precedent, a different conclusion would have been reached. It was therefore sustained, because it did not destroy the State. Suppose, however, that a State should pass a law that all property within its borders should be forever exempted from taxation, and the State should not provide a revenue from any other source, would this Court now, even with the precedents before it, still hold that the law should be sustained? I am sure it would not. But, however

this may be, the illustration of the parting with the taxing power, is not a good one in this case, because that is merely parting with an incident; this is parting with the principle itself. Therefore, it must be true that the granting of a power or privilege is exclusive, as against every other power but that of the State.

II.

Since preparing thus far the argument in this case, I have been furnished with a copy of the brief of one of the counsel for plaintiff in error, and I shall, in consequence, devote the remainder of the argument to answer that of counsel on the other side of the case.

Counsel opened their case by referring to the prejudice which they claim existed against associated capital, especially when it takes a corporate form, causing the people to forget the benefits received, and asserting that money is much less dangerous to the public when distributed among the different members of a corporation than when concentrated in a single individual.

None of the arguments of counsel on this point shall I attempt to controvert, except that charging a prejudice to exist against corporations. I deny that any such prejudice exists among the people, except among a class that are not worthy of being considered a portion of the people, viz: those who favor the destruction of all property. The best people of this country are in no manner prejudiced against railroads or any other corporations. In fact, they favor, and in Illinois, especially, have they been so generous towards railroad corporations, that now nearly every portion of the State is groaning beneath the burden of local indebtedness incurred for the sole purpose of assisting and encouraging railroad corporations in building and operating railroads. So great indeed was this generosity exhibited that it became necessary to call a constitutional convention and amend the constitution, forever prohibiting any of the municipal divisions of the State from granting further aid to these corporations. So favorable were the people to corporations, that while Illinois as a State does not owe a dollar for any purpose, the cities, towns, villages, counties and

townships of the State owe something over $51,000,000, fully nine-tenths of which is owing for aid and assistance rendered to railway corporations. It can not be true, then, that any prejudice exists among the people against corporations of any kind. The insinuation is made that the courts—and by that of course is meant the courts of Illinois—share in this prejudice, and that therefore corporations are compelled to go to the federal courts for justice. This is perhaps plainer than counsel intended to put the case, but it is the substance of his argument, and we may as well use plain language. I have the gratification to say, and am proud of the opportunity to say it, that the honor and integrity of the Supreme Court of Illinois can not be assailed by any one. It has been placed far above either successful assault or defense, blame or praise, by its long record of honest and able adjudications which now form the substantial basis upon which is built the legal superstructure of nearly every State of this Union. By these adjudications, by the long list of famous names who have occupied seats upon it, and by the respect and confidence felt in it by the people of the country, its character and standing will be judged not by what defeated and disgruntled counsel may say of it.

While it is true that no prejudice whatever is felt by the courts or people against corporations of any kind, there does exist a prejudice amongst the people against the manner in which some corporations are managed and the way in which their business is conducted. It is the same prejudice which exists in the minds of all honest people against those who trespass upon their rights, and oppress them in person or in property, and in this they are perfectly justifiable. The people become necessarily prejudiced when, after having given thousands of dollars of their hard earnings to assist a corporation in building a railroad, they see that same road charge them fifty per cent more for carrying their produce to market, than they charge the people accessible to the next station, because there happens to be at that station a competing line of railroad and none at the other. The people are apt to become prejudiced when they find the managers of a railroad charging one man $10 for carrying freight a certain distance and another man $15 for carrying

similar freight the same, or a less distance. The people are naturally prejudiced when they are informed that railroads, as convenience or caprice may suggest, discriminate between individuals and places in the charges made by them. And the people are sure to become prejudiced when they are informed that individuals in all their relations with the public are under the control of the law, and that corporations are not. It is not the corporations, however, they are prejudiced against. It is the reckless and unscrupulous violation of all law that is sometimes indulged in by those who control corporate property, against which they are prejudiced. It is also true that courts have the same prejudice against the violation of law by the managers of corporate property, that they have against the violation of law by individuals, and they often show it in the same way—by punishing them for it. So much for the argument that a prejudice exists against corporations.

It is next urged by counsel for plaintiff in error that there is no foundation for the statement that railroads are monopolies, and that therefore there is no reason why they should be more carefully guarded against, or are any more in danger of encroaching upon the rights of others, than are other corporations or individuals. I take issue with him on both propositions. I say railroads are, necessarily, monopolies, and, because they are such, they should be more closely guarded than other corporations or individuals. I do not claim that they should be any more restricted or circumscribed in any of their rights or powers; but because they are necessarily monopolies, they should be more closely watched, and their actions controlled, because there is more danger that they may do harm, and there is no relief in such event, except by the slow, tedious and often very imperfect and uncertain remedy of an appeal to the courts. A recurrence to the penalty provided by law for reimbursement for losses incurred, is never a satisfactory conclusion to the person injured. In other words, in all cases where a monopoly does not exist, a person refused equal privileges with others can resort to some other means of accomplishing his purpose, without recurring to the law; but in the case of a monopoly, he has no other means of attaining his object. Therefore the law should more carefully

and thoroughly protect against injury by a monopoly, and prevent it from encroaching upon others, than where one does not exist. Counsel says, "Railroad companies have been termed *monopolies*. Looking at them from the standpoint of the present, such an application of the word is a pure misnomer. Take, for illustration, the present plaintiff in error, with its line of road crossed or paralleled for business purposes, at every important station, by other lines of railroad, and at all its terminal points placed in competition with water transportation for freight and passengers. And yet it is placed before the public as a *monopoly*. We might well inquire, *a monopoly of what?*"

Counsel follows this subject into an investigation and historical recital of the various charters granted by Illinois to railroad companies, in an appendix to their brief.

Let us see if railroads are not *monopolies*. The State of Illinois is the most favorable ground we can take as an illustration. It has more miles of railroad than any other State in the Union, having something over ten thousand miles within its borders. It is cut up and seamed in every direction with railroads. There are only two counties in the State that have no railroads within their boundaries, and these are small and not very populous.

And yet we find that this ten thousand miles of railroad is operated by only fifty seven railroad companies. Most of these roads merely enter the State, or are short coal or small insignificant roads. Over eight thousand miles of the railroads in Illinois are operated by ten railroad corporations. A glance at the map and a slight knowledge of the history of litigation in the West, within the last year, will demonstrate the fact that most, if not all, of these ten great corporations have divided the State between themselves in such a manner that competition exists only in name in this great railroad State. It is a well known fact, which fact in these days requires no proof, that one line of railroad invariably swallows up by purchase or lease all competing lines, or else if two lines become so large and powerful that they cannot *swallow each other*, they invariably pool

their earnings and so agree together upon their charges, that, so far as competition is concerned, it does not exist. How many of the citizens, business men, manufacturers and farmers in Illinois have competing lines of railroad upon which they can ship their products? It can safely be asserted that not ten per cent. of the products of the soil, and not twenty per cent. of manufactured articles, can be as well and conveniently shipped from the neighborhood where it is raised or manufactured to market by either of two lines of railroad under competing rates.

It is nonsense to say, that when men have the power, either individually or in the aggregate, to get a higher price for services they may render than a lower price, that they will voluntarily choose the lower. We know that men will charge what they can get for whatever they may do. Questions of policy, or the gratification of some passion or prejudice, may induce corporations to charge less amounts than they otherwise would. But no one can question that ordinarily they will charge what they can obtain. Counsel say in their argument, "There is in this country, no monopoly of railroad enterprise, except such as the legislative power of the several States has seen fit to give, and certainly none has been given Illinois."

This statement is fallacious and misleading. Railroad monopolies are not created or made. They grow, necessarily, out of the very act of building and operating a road. A railroad cannot be built that is not a monopoly, on some portion of its line. One definition of the word monopoly is, an exclusive power, control, or command. The exclusive right or power to do an act is a monopoly of that act. An exclusive power or right to convey goods from one point to another is a monopoly of the conveyance, or power to do the conveying in question. It is argued that no one is compelled to use a railroad as a means of conveyance, either for persons or property; that each individual can use the public highways, and other methods of transportation, when he chooses so to do. While this appears at first blush to be true, yet it is well known that it is *not* true in fact. We are emphatically a live business and commercial people. In all sorts of commercial business, competition and rivalry necessitates

quick, active transactions. Profits in most kinds of business are comparatively small, and this must be made up by an increased volume of business done. To do this business, the most rapid means of transportation must be used. If A does not use this rapid means of carriage, his rival in business, B, will do so, and by the more readily taking the advantage of fluctuations in the prices of the commodities dealt in, and the greater amount of business done, will soon utterly ruin and destroy the business of his slower neighbor, A. Suppose two merchants begin business in a city, one using the ordinary roads of the country, the other using the railroads; can there be any doubt of the result? Then, every business man is necessarily compelled to use the railroads, where there are any in existence, and every man in this country has *some* business. Then every man is compelled, more or less, to use the railroads, where there are any railroads within the range of his business, and the argument that he is not compelled to use them, is not true in fact. Now, I think I have shown that a very small proportion of the people in Illinois have equal access to competing lines of railroad. Consequently the railroads, so far as concerns the large portion of the business of this State, have in fact a monopoly of that business, because they have the sole power to do the conveying in question. Abstractly and theoretically, perhaps, they have not the monopoly, but really and practically they have. The argument, then, of counsel, that there is in this country no monopoly of railroad enterprise can not be maintained when we get down to the actual operation of the system.

Counsel say, or intimate, that railroads can be built everywhere and between all points and the right to do so is free to every one. Therefore, there can be no monopoly of railroad enterprise. Here, again, is the statement of a theoretical truth which covers a practical fallacy. It is true, in Illinois, that railroads can be built anywhere and between all points. But the very fact that a railroad is already built and being operated between these same points, practically prevents the building of another between the same points, or, if such competing line is built, practically, it is at once purchased by the first road, or the business of the

two roads is at once pooled, and nothing has been accomplished towards encouraging competition. This is the *practical* result of the *right* to build competing lines. Evidences of such results of the building of competing lines, need not be here produced, for they may be found in the newspapers of every day. Railroads are too costly and their building and operation are too much in the hands of professional railroad men, who are in the business solely that they may make money out of them, ever to hope that they will be built or operated for any other purpose than to make the most money they can for their owners and managers; and, that they make the most money for such purposes, it is to their interest to monopolize the carriage within their reach as much as possible.

It is alleged by counsel for plaintiff in error, that the State of Illinois, up to the time of the adoption of the constitution of 1870, acted upon the theory that railroads were not "monopolies to be regulated and controlled by the State when no such right of regulation was reserved, but, rather that they were private enterprises, incidentally beneficial to the public, the corporations themselves, created for the purpose by the State, being responsible parties, capable of taking and exercising certain powers and of contracting and being contracted with, *in their discretion*, for the purpose of carrying into effect the objects named in their respective charters..'

It is evident, from an examination of the early charters granted by the State of Illinois, that they knew little, if anything, about what railroads were, how they were to be operated, or what they could do. It is evident that the people of Illinois, as well as those of other States, up to a very recent period, had very little conception of railroads, their capabilities, or revenues, and the legislatures were equally ignorant. They seemed to think that railroads were merely iron turnpikes, over which every man could run his own carriage and pay toll for the same at the toll gates erected along the line of the road as upon turnpike roads. The first railroad charters were merely adjuncts to canal or turnpike charters, giving the corporators all the powers, privileges and franchises peculiar to the building and operation of canals and turnpikes, and then authorizing

the corporation to build a railroad instead of a canal or turnpike, if the corporators thought best so to do. Of course, if a railroad had been built under such authority, it would have been built and operated with the same powers and with the same rights only as the canal or turnpike would have had. No one in these times had any conception of the cost of building and operating a railroad or the profits of the same when built. We find upon investigation of the early charters of ferries, bridges, canals, turnpikes and other public enterprises where tolls were provided for, that it was the custom of the legislature to fix the tolls or the rate to be collected only where they themselves could easily estimate the cost of the work to be done, and approximate the amount of profits that would be derived therefrom. For this reason in some cases the legislature fixed in the charter the exact charge that should be made for the passage of each character of vehicle, etc. In other cases the legislature delegated the power to the county court of the county in which the franchise was located, or the county or counties through which it ran, to fix the tolls. In still other cases the legislature provided that the tolls should not exceed a certain percentage of the capital stock of the company or the amount invested by them in the improvements made.

In some cases charters were granted without any limitation upon tolls. All these ways of making provision for tolls were used in Illinois indiscriminately, and there was, consequently, no established practice, and no conclusion, favorable or unfavorable, can be drawn therefrom, and no opinion formed of the intention or understanding of the legislature can be obtained from the manner of granting these privileges. It can readily be seen that when railroads were evolved and grew slowly out of the turnpikes, that changes would have to be made to accommodate the changed circumstances, and to make the law harmonize with the powers developed. Thus we find, when it became evident that railroad companies must run their own carriages upon their roads, that charters afterward granted, left out the authority to built toll houses and appoint toll gatherers. It then became evident, that the tolls upon railroads for the carriage of persons and property must be gathered in some other way. The county commis-

sioners, through which the road ran, could not be authorized and empowered to fix the tolls, because the trains ran too rapidly through the counties to allow this; and having no toll gates, and one county fixing one rate of toll, and the next county another, it would create interminable confusion, and the law could not be properly enforced. The legislature could not, itself, well fix the rates of toll to be charged, because they had no means of estimating the cost, nor the profit to be obtained, and therefore the amount fixed would nearly always be unjust, as it would be too high, or too low. It was also developed, that it would not do to fix the tolls at such a rate as would pay a certain percentage upon the capital stock, or upon the amount invested in building the road, because roads were being consolidated, were being sold and transferred to other companies, the capital stocks of companies were being placed at enormous and unlimited amounts over what was necessary to build, equip, and operate them, so that the rates of tolls collected would be unlimited in amount, and the uncertain sums necessary to build and equip the roads, without any basisupon which to estimate the cost, would leave the tolls practically under the control of the corporation anyway, if they built the road at all. All these things made it necessary that the legislature should adopt some other system of providing for and regulating the rates and collection of tolls, different from those adopted for ferries, bridges, canals and turnpikes.

Even as late as 1849, a general law was passed, providing that if the revenue from tolls exceeded fifteen per cent. of the capital actually paid in, the legislature might alter or reduce the fare or toll to be collected. But it was found that this would require a record to be kept of the amount of capital stock paid in by each road, and a special act for each railroad would have to be passed at each subsequent session, altering and changing the rates on each road, as times changed and prices fluctuated, and the income ran above or below the amount fixed. It would have required continuous sessions of the legislature from that time to this, to have kept up with the necessary changes made in the receipts of railroads above and below the fifteen per cent. profit on capital actually invested. It was found that

this would be impracticable, and, after 1849, it was entirely abandoned in the charters of railroads. Can the impression be drawn from this fact, that the legislature intended to entirely abandon all control over the rates to be charged by railroads? We certainly think not. We have as good a right, if not better, to allege and argue that the legislature, knowing they would always continue to have the supervisory power over railroads to regulate their charges, thought it unnecessary to place any special limit upon them when the charter was granted. It is urged that, having said nothing whatever concerning a limit or a supervisory power being reserved, it was therefore abandoned. We say, why should a limit be fixed, or a supervisory power be reserved, when it was well known that such a power existed in the law, any way.

We can better urge, that knowing that the supervisory power to regulate always existed in the State, the legislature considered it absurd to specially reserve this power in every act that was granted. Better and more consistently can we do this than can it be urged that it was understood, that the absolute uncontrolled power was granted where a supervisory power was not specially reserved. It will be found, upon an examination of the early charters granted by the State to ferries, bridges, turnpikes, canals, etc., where tolls were provided for, that, in all cases, some special provision was made concerning the tolls, and which it was necessary to specially incorporate in the act. As, that the county courts of the county in which the franchise was located should fix the tolls, or that certain specified rates should be charged, etc. In these cases the rates were fixed expressly, or the power to fix them was delegated to some other authority. In no charter ever granted by the State of Illinois, that I have been able to find, has the right to regulate, or supervise tolls ever been expressly reserved to the State. I imagine such a thought never entered the mind of any member of any branch of the State government, either executive, legislative or judicial, until the question was raised in this case, and its twin case of *Ruggles* v. *Illinois*.

It is argued that the exclusive right to fix the tolls given to these railroads, and particularly to the Illinois Central, was for the purpose of

inducing capital to make investments in the State. We have already seen, from the written application of the original corporators of this railroad, that they sought the right to make the investment, and that the State did not ask or solicit it in any way. In their application the original corporators did not ask, as an inducement, the grant of the power to fix the tolls. It was no part of the consideration for making the investment. Can it be supposed that the corporators would have neglected to ask for such an important privilege if they had believed it could have been obtained? The exclusive power forever to fix and regulate their own rates for the carriage of freight and passengers would have been of much more value to the company than all the lands and property they could have obtained, and yet, they were very careful to insist upon the lands and other privileges being given them, and did not ask for that most valuable privilege of all, the exclusive power to fix their tolls. Is it possible that the company believed they were getting this great and unlimited heritage, or that the State believed that it was parting with its most sacred right of supervision? A right so important to the people of a State as this, should not be granted away with so little ceremony. It seems not to have been worth claiming by the persons seeking the charter, and without having been asked for by the grantees, it was conveyed away by the State without any hesitation, and until thirty years after it had been so given, it was never discovered by any one that it had been so parted with by the State. Do these arguments seem reasonable? Does it seem possible that so important a power, so dangerous a privilege, so powerful a weapon should be placed unrestricted in the hands of a subject by the State, without having been sought, and without the records of the proceeding showing any resistance by any member of the legislature or officer of the State? Is it possible, that the able, far-seeing statesmen who at the time this charter was granted managed the affairs of the State, granted away the most important prerogatives of her government without a word or a hand raised in resistance? Then, Douglas, Lincoln, Trumbull, Breese, Logan, Browning, Washburn, Davis, and many others almost equally able and famous as statesmen, legislators and judges, were manag-

ing and controlling the affairs of the State, which they believed would finally be the empire State of the West. Is it possible that these men carelessly gave away the most inestimable and precious power of a free government without solicitation, and without a thought of the danger of such a power in the hands of a corporation?

It is said by counsel on the other side, that—

"In 1835 the State was largely unbroken forest and prairie, far removed from markets, and almost beyond the boundaries of civilization. The products of its soil, except so far as required for home consumption, were scarcely worth the harvesting, and penury was the supreme condition of its citizens."

This may be all true of 1835, but this charter was granted and the contract made in 1851, when a very material change had taken place and when Illinois had advanced far towards her present position as a State. But even if such a state of affairs still existed in 1851, the further fact was apparent, that there was no such inviting field on earth for the investment of railroad capital as in Illinois. From 1850 to 1860, capital was everywhere seeking for investment in railroad enterprises. The States of New England, New York, Pennsylvania and Ohio were being covered with schemes and plans and surveys for railroads. The level prairies of Illinois were sought out by capitalists from the East and from Europe. It cost very little to build a railroad in Illinois. Railroad building at this period of its history was very much of an experiment, and, of course, cheapness in building was a great desideratum. When money was seeking for investment in railroad building, of course it would naturally seek for places where most miles of road could be built for the least money. I have seen five miles of railroad built in Illinois where the cost of grading did not exceed one dollar a mile. Two furrows were plowed in the open prairie the proper distance apart, and the ties laid on the undisturbed prairie sod. Of course, in time this had to be improved, but it did very well for the time being. Consequently there is nothing to be learned from the fact that the State was seeking for capital with which to create internal improvements; for at this time, capital was seeking the State much more diligently than the State was seeking the capital. This

is evidenced by the fact of the capitalists asking to be allowed to make the investments.

Counsel call attention to the general law of 1849, which provided that the legislature could reduce the tolls when the profits exceeded fifteen per cent. of capital actually paid in, but that in no case should the rates charged for the carriage of passengers exceed three cents a mile, and they say this general law was never acted upon in the organization of a single company, so far as counsel is aware, and certainly not in respect to any of the principal lines of railroad in the State. Counsel can hardly have forgotten that the Central Military Tract Railroad, over which the controversy in the Ruggles case finally culminated, was specially organized and incorporated under the general law of 1849. It is true, it was afterwards amended by an act amounting nearly to a special charter; but this is one case at least where the railroad company was organized under the general law of 1849, and is now a portion of one of the most important railroads in the country.

Counsel also say:

"The limited right of regulation reserved to the legislature, was evidently viewed with distrust, and the granting of special charters was continued, from which this obnoxious feature was wholly omitted, although it is probably true that no railroad company, organized and doing business within the State, has ever approximated, as an average, annual dividends of fifteen per cent. upon capital stock actually paid in."

From the History of Illinois, heretofore cited, it seems that the Illinois Central Railroad never had any capital stock actually paid in, nor did it need any, yet this same road has an acknowledged capital of twenty-nine millions of dollars, upon which a dividend of seventeen per cent. was declared in February, 1883, as reported by the company. If it has not paid annual dividends of over fifteen per cent., it has shares of stock that are worth in the market much more than the bonds of the United States Government for the same amount, and it will not do in this case, under these circumstances, to plead poverty or destitution. Of these facts we ask in this case no further consideration but as an answer to the argument

of counsel on the opposite side, continually urging and pressing the claim of the company upon the sympathy of the Court.

I am glad to know that this company is so prosperous and rich that it can pay these dividends, and that its stock stands so high in the market. It speaks well for the State, and the State shares in the prosperity of the Central Railroad. The State is proud of the road, of its high standing, of its prosperity, of the careful management of its officers, and it benefits practically by the seven per cent. of its gross earnings which it pays into State's treasury.

But all this has nothing to do with the issue here. No matter how much the Central Railroad may do for the State; no matter how much its stock may be worth; no matter how much dividends it may pay to its stockholders; no matter how high its stock may stand in market; no matter how careful of its funds its managers may be; if in doing all this it oppresses, or injures, intentionally, a single citizen of the State, however poor, insignificant, ignorant or humble he may be, then it becomes the duty of the State to arise in its majesty and compel it to do exact justice to such citizen. And, if the State should fail in this duty, it no longer is "a government of the people, for the people and by the people," but is a farce, a fraud, a failure.

As Judge Walker, of the Supreme Court of Illinois, in the case of *The Wabash, St. Louis and Pacific Railroad Company* v. *The People*, 105 Ill. 236, well said:

"If the doctrines contended for were allowed, it would be to release and entirely exempt all corporate bodies in the State from the governing or sovereign power of the State to prevent wrong and oppression of the people by such bodies. It would be to hold that the State, by creating and endowing railroads with the simple and necessary power to fix charges for carrying persons and property, had, through the legislature, without intending it, sold or surrendered the governing power of the State, and that such bodies are empowered to extort from the masses annually, for all time to come, sums greater than the revenues of the federal government beyond fair compensation for such carriage. If such bodies can not be controlled, to the same extent and under the same necessities for the general welfare, by the State, as natural persons, then the powers of government have been subverted and the States virtually destroyed, and they have become useless and expensive appendages to our governmental system. They would become powerless to perform the functions and an-

swer the great and all-controlling purpose of organized government, which is to secure protection. It would undeniably be to recognize and declare such bodies above and beyond legal control, to create government agencies and instruments greater than the sovereign State, and not amenable to its governing power. Present the question as we may, whether as exempting them from such control under the fiction that the granting of the charter of plaintiff in error was a contract never to control it in its charges and never to control its power to wrong and oppress the people, and that it is protected by the obligation of the Constitution, or that the regulation of such charges and the prevention of extortion and unjust discrimination are regulations of commerce among the States, and are prohibited under either claim, the power of the States to protect the people from such oppression would be destroyed and the States themselves would be destroyed. To admit either proposition must inevitably lead to this result."

This opinion of Mr. Justice Walker, is directly in point in this case, and I would respectfully ask this Court to read the opinion in full. It is the most exhaustive, conclusive, and *appropos* decision that I have been able to find anywhere, upon the question involved in this case. The opinion was written by a judge who has served for twenty-seven consecutive years upon the highest bench in the State of Illinois, and in that time has been honored four times in succession by a unanimous election to the position by the people of his district, one of the wealthiest and most enlightened in the State. Under these circumstances, if for none other, his opinion is well worthy of close consideration. But when we consider the opinion itself, aside from other considerations, it is impossible to avoid the conclusion that it emanates from a heart devoted to the interests of the people and good government, and a mind that is ever clear in its conceptions of right; and no unprejudiced mind can fail to be convinced by his reasoning. I am satisfied, that when the decision becomes more publicly known, it will be a leading case in the literature of the courts, and will go far, at least, to settle the law upon the questions there decided, for the argument in support of the conclusion is incontestable. I would specially call attention to the whole opinion, it being in its general features applicable directly to this case, and as well supplying the want of a more elaborate opinion in this case, giving the extended views of the Supreme Court of Illinois.

Counsel argue long and eloquently upon the efforts made by the State of Illinois in 1836–37 to improve the State by the construction of its own

works, and speak affectingly of its failure. Yet it must be remembered that between the time when the State made its last effort, and the beginning of the Illinois Central Railroad, fifteen years had intervened and there was a wide difference between the condition of the State in 1837 and in 1851, and it will be difficult for counsel to make his illustrations stretch from the hard times of 1837 over the flourishing period from 1842 to 1850. What the hard times and discouragements of 1836–37 have to do with the transactions of 1851, and succeeding years, is more than the counsel on this side of the case can well see.

The State of Illinois repealed its Internal Improvement Acts on February 1, 1840, (Laws of 1839–40, page 98) and by the year 1851, when the Illinois Central charter was granted, had about recovered from the effects of its unfortunate experiments. It had, consequently, also much costly property to turn over to the present company as the result of such experiment. How it follows, that, because the State had lost largely in its own experiments, therefore it was ready to give away everything it had left, to others, is not easily seen. No evidence has been offered, either historical or otherwise, to show that the State was in financial straits or the government dependent or specially anxious for internal improvements, at the time this charter was granted. It would appear, from the fact that the offer came from the company, that such was not the case. But even if it were the fact, it proves nothing tending to show that the State surrendered its right of supervision over the tolls of this road. It is argued that the constitution of 1848 instituted another policy on the part of the State, to wit: The policy of encouraging improvements carried on by private enterprise. This proposition will not here be disputed, nor will it be disputed that this policy has been a successful one, both to the State and to the investors. We wish in this case to give counsel the full benefit of every well-founded argument that he can find in his favor. But some of the conclusions drawn from these facts we utterly deny and propose vigorously to dispute.

Counsel say:

"Under this charter, which is a public law, and on the face of it provides that it shall be liberally construed, the company was organized, the money of its stockholders and bondholders, who have at all times been largely non-residents of the State, subscribed, contributed and invested, and having passed the period of struggle incident to a new enterprise in a new country, and, by the fact of its existence, contributed largely to the development and progress of the State, the Illinois Central Railroad Company, at the age of more than thirty years, has settled down into an established fact, to be judged of by itself, and its interests are rightfully to be considered, first, with reference to itself and its stockholders, secondly, with reference to the State and the people of the State, towards whom *it owes only such obligations as may result from its contracts understandingly entered into*, all of which, as it claims, have been carefully and conservatively performed."

We do not believe that the records of any court can show, nor does the literature of the bar, we believe, present, an example of such overweening arrogance and egotism as is contained in the foregoing sentence, which cannot be the true sentiments of the respected, honored and able counsel who penned them, but must have been written to please the egotistical vanity of his lordly English clients, the holders of the stock of his railroad, and whose absurd natural vanity would be so greatly tickled to think that so fine a lawyer before so dignified a court would so boldly declare that they and their interests were so much more worthy to be considered FIRST. And that the interests, and rights, and privileges of the poor mud-sills and common people of Illinois—the poor trash of the West—were always *secondary* and subservient to that of the grand and noble few whose fathers had money enough to buy Illinois Central Railroad stock when it cost nothing, and could hold it until it paid seventeen per cent. dividends. But, however this may be, it is simply alarming that such doctrines as these can be calmly advanced in a court of the dignity of this Court. When great corporations or their counsel can publicly assert the doctrine, that the rights and interests of a corporation and its stockholders are paramount and of first importance to that of the State and the people, it can scarcely be wondered at that the people begin to fear the constantly increasing power and arrogance of the great corporations, and often appeal to the legislatures and courts to repress and keep them within bounds. Nor can it be wondered at, that in the event

of a failure to obtain relief in this way, recourse should be had to the same court, so often appealed to in this country, where the trial, conviction and execution follow each other so rapidly that no appeal is taken, and no errors are ever corrected. It is gravely asserted that in this case this corporation is "to be judged of by itself." The meaning of this is, that the Illinois Central Railroad Company is to be its own judge; to determine its own rights; to consider its own interests; to fix its own powers; to decide its own cases; and in short that it is above and beyond all law; that it is supreme; the great I Am; the supreme ruler of its corporate universe. He further says, "and its interests are rightfully to be considered, *first*, with reference to itself and its stockholders, and *secondly*, with reference to the State and the people of the State."

This Court is asked, by this argument, to say deliberately to the people of Illinois, that the interests of the corporations and their stockholders are paramount to all other interests, for the principles at the foundation of this case apply to all railroad corporations in Illinois, as all of them stand alike in this respect. Could the old feudal barons of King John's days have asked for more power than this? Is another power, similar to that which produced the *magna charta*, insidiously growing up in our country? Is it true that an American court is calmly and deliberately asked to announce such a doctrine? Can it be that we are gravely told in this boasted land of liberty that *the people* and *their interests* are to be considered SECOND? Is it possible, that because a few men, by some means, have been enabled to own a few stocks in a railroad corporation, that therefore they are *first* to be served, and if anything is left it may be thrown to those whose toil and sweat has produced it? If so, another *magna charta* is needed, and it will surely come. But it does seem that no argument would be needed to convince any one of the utter absurdity of such an argument. If that be the law, the country will, and ought to be, entirely abandoned to the railroad corporations, and let it be in name, as it would be in fact, a government of railroad corporations, instead of a government for the people. Corporations *first*, the people *second*, is a new doctrine to publicly advance in this country, where it has

heretofore been our fondest boast that the people ruled. If such is not the fact, we should take down the stars and stripes, and erect in its place the red flag of the railroad engineer. It would be wise here, at all events, from developments already made in this case, at least to erect the danger signal.

Counsel have said, that the fact of the existence of this railroad has "contributed largely to the development and progress of the State." This is no doubt true, but the man who has built his cabin on the soil of Illinois; who plowed a furrow upon the prairies; who cut down a tree in her forests; who built a fence around an acre of soil; who built a barn, a corn crib; who planted a fruit tree, is equally entitled to credit for what he has done. Each and all have contributed, alike, their share in her development, and each is entitled to an equal place in the gratitude of her people. Neither the railroad builder, nor the stockholder who furnished the money, ever thought of the great work they were doing for posterity. They built the railroad and invested their money, *not* for the purpose or with the view to make Illinois the great State she has become, but for the purpose of making money for themselves. They were not running over with philanthropy toward the people of Illinois. They did not send their money or stake their credit a long distance from home—away off in the wild prairies of Illinois—just to develop her soil and render happy and prosperous her future inhabitants. The soul of the English stockholder was not all melting with love and affection, nor was his heart swelling with tender solicitude, that he might live to see the wild and unbroken solitude of Illinois yet teeming with a happy, contented and prosperous people, and her virgin soil blossoming as the rose. His solicitude was, that his investment might return him abundant shekels of gold, and that his pocket might swell with the seventeen per cent. dividends returned by admiring and admirable managers. And no doubt also hoping, at the same time, that he might have returned with his dividends, the flattering unction, administered by some devoted admirer, that his interests were the *first*, in all this world, that should be considered, and that of th ecommon herd, the *second*.

It is also argued that from sections adopted in the constitution of 1870, the State has recognized the charter of the Illinois Central Railroad Company as a contract. We do not question this fact. We do not doubt but that this charter is a contract between the State and this corporation. But it by no means follows that everything contained in the charter is a contract, or that the contracts that are contained in it should be extended too widely. A very strong argument could be made in this case, were it necessary, that the power given by the State in this case to the board of directors "to establish such rates of toll for the conveyance of persons and property upon the same," was a *law* and not a *contract*. Mr. Justice Washington, in the Dartmouth College decision, defines a contract to be "a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." But in the same case Chief Justice Marshall says that as the word "contract" in its broadest unlimited sense, as used in the constitution of the United States, would be "an unprofitable and vexatious interference with the internal concerns of a State—would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances,—that as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit,—the term 'contract' must be understood in a more limited sense."

It might well be argued in this case, that in the limited sense which should be applied to the word, this is not a contract but a law prescribing by the superior power in the State what is right, to-wit: that it is right that the board of directors shall have the power to establish tolls. Chief Justice Marshall further says in the same case:

"If the incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States."

Now, is not the power given to collect tolls a grant of political power? It is a power primarily existing alone in the government, and which the government only can confer. It is a power belonging originally and exclusively to the government, and is like the power of eminent domain, one in which the State is alone interested. It is a power incident to the control of its public highways, which exists in every State, as a part of its police power. It is one method of providing for the maintenance of the public highways of the State, drawn directly from those who use them. Highways are created for the use of the people of a country, and are maintained and controlled by the State alone, for the benefit and use of its citizens. Tolls may be collected by the State from those who use these public highways, to provide means for keeping them in repair and promoting their usefulness to the public. When the right to construct these public highways is given to a corporation, the right to collect tolls may be given with it, having in such case the same primary object, to-wit: to maintain and support the highway when constructed. The grant of the right to construct the highway is the grant of a political power, because it pertains to the public interest, which alone the government is instituted to promote, and the right to collect tolls being a part of and an incident to the maintenance of this political grant, partakes of its nature and is granted under the same limitations. Then it may well be contended, that a grant of the right to establish tolls is a grant of a political power, which, under the authority of the Dartmouth College decision, is under the sole control of the State granting it. But it is unnecessary to enter into a discussion of these principles now, as we have sufficient grounds of defense already, without entering upon so abstruse a question as this.

The second point made by counsel for the railroad company is, that the first part of section 8, of the company's charter, is unmeaning and needless, because it confers no more power than that which belonged to the company without it. We may admit that the power expressly granted to a company to make by-laws is a useless grant, because the power exists without it, yet, it by no means follows that the first part of section 8 is unmeaning or useless.

I have, in the first part of this argument, endeavored to explain to the Court our understanding of this portion of section 8. It is a rule of construction that no part of a law must be held to be unmeaning, if any other construction can be given to it by which it can be held to have a meaning. It cannot be presumed that a legislature did not understand language, or the force of words. Nor can it any more legitimately be held that the legislature did not understand the law and what power belonged to corporations, as a portion of their inherent powers. We contend, that courts have no more right to declare that legislatures have granted useless powers, than legislatures have to enter into judicial realms and declare that courts use useless language in their decisions. We think that the power granted in the first paragraph of section 8, to make by-laws, is merely an extended expression of the general grant given in section 5, to the board of directors of the company. This construction would harmonize this clause of the section with the ordinary rules of construction, and would render all the words of the section valuable as conferring a direct and clearly expressed power upon the board of directors, as the agent of the corporation.

It is claimed that the Governor of the State having been made a director of the company by the charter, it was the intention, therefore, that the board of directors should be created an arbiter between the corporation and the public, and consequently the directors were empowered to establish the rates of toll as distinguished from the corporation. This is a new idea. But the Court will remember, that exactly the same section was in the charter in controversy in the Ruggles case, and the Governor was not, in that case, made a director of the company. By the charter in this case, seven per cent. of the gross earnings is to be paid to the State. In the Central Military Tract charter, no such provision existed. Can any one doubt that the Governor of the State was made a director that he might have a right to see that the State received its due share of the earnings? No other construction was ever placed on this charter before. If there could be any doubt upon this question, a reading of the charter would settle it, for the charter provides, that the board of directors shall

consist of twelve stockholders and the Governor of the State, and in it the Governor is only given one vote. His power to affect the rates established would thus be utterly valueless, and an attempt by him to do so would be absurd, and the subject only of ridicule. As a third proposition, counsel for plaintiff in error again asserts the old and threadbare proposition, that the charter of the Illinois Central Railroad Company is a contract between the Company and the State, and he cites two cases where the Supreme Court of Illinois have so held, and also a separate article of the Constitution of Illinois, of 1870, to the same effect. If it is any gratification to counsel to set up a man of straw for the pleasure of knocking him down again, we have no reason to find fault with it. We have been as busy asserting that the charter of the Illinois Central Railroad Company is a contract as has our adversary, and we are not now disposed, for the mere sake of argument, to assert the contrary.

We do, however, dispute the broad assertion, that the legislature, by the act authorizing the board of railroad and warehouse commissioners to fix a maximum rate of fare and toll for the carriage of passengers and freight upon the railroads of the State, attempted thereby to "rehabilitate itself with all the powers respecting the control and management of railroad property owned by private citizens under private charters." This we distinctly dispute and deny. Counsel are prolific in broad assertions, but seem troubled with great poverty in the shape of argument. Counsel wilfully ignore, or are unable to comprehend, that although this charter may be a contract, there may be a question as to what the contract is. We deny that this is a contract by the State to surrender the supervisory power of the State over all things that may require supervision, in promoting the public interest, or in advancing the public good. While admitting that it is a contract, giving the company, through its board of directors, the right to establish and alter, from time to time, the rates of toll for the carriage of freight and passengers, we deny that it is a contract that the State shall *never* seek to regulate or supervise the same, to protect its citizens from oppression and injury.

But generalizations have little value as arguments.

Here let me call attention to one fallacy that is continually being asserted, and upon which counsel for railroad companies are continually ringing the changes, and that is, that the State of Illinois, by its legislative acts giving the board of railroad and warehouse commissioners power to fix maximum rates, is assuming to itself the power formerly delegated to the companies, or their boards of directors. Such is not the case. Neither the legislature nor the board of railroad and warehouse commissioners, in any case whatever, have attempted to fix the rates of toll or fare which any railroad company may or shall charge. The law of 1873 simply authorizes the board of railroad and warehouse commissioners to fix a certain amount as the maximum rate of charges, which maximum rate shall be considered *prima facie*, only, a reasonable rate. It in no way fixes this amount as *the* rate which railroad companies shall charge, nor does it restrict railroad companies to this amount. It does not make railroad companies liable to any fine, penalty or punishment if they charge more than the maximum rate fixed. No rate or sum is fixed in any way which the railroad company shall, or shall not charge, nor does it make them liable in any way for charging more or less than the maximum rate. A false impression has grown up, or been asserted, concerning the scope and effect of the law of 1873. I am sure that this law is not fully understood, and I desire now to call the careful attention of the Court to what this law really is. *It is simply a law casting the burden of proof upon the railroad company to show that the rate charged is reasonable, if it is over a certain sum.* This is all it claims or purports to be, and it fixes no penalty upon the railroad company unless it fails to prove that the charge is reasonable. Let this law be clearly and distinctly understood before it is condemned. The law is not copied in the record, and is too long to be incorporated here, but the section particularly affecting this case and this question, is as follows :

"Sec. 8. The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers and freights and cars on each of said railroads ; and said schedule shall, in all suits brought against any such railroad corporations, wherein is in any way involved the

charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freights and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules."

In section 4 of the same act it is provided:

"Any such railroad guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights, shall, upon conviction thereof, be fined in any sum not less than one thousand dollars, nor more than five thousand dollars," etc. "*Provided*, that in all cases under this act either party shall have the right of trial by jury." [Revised Statutes of 1874, pages 818 and 819.]

From these provisions of the law it will be seen, that in no way does the law purport to fix, establish, regulate, or interfere with the charges made by railroads for the carriage of freight or passengers, or any other matter or thing. Sec. 4, cited, punishes extortion and unjust discrimination by railroads. Sec. 8 provides that if they charge more than the fixed schedule rates this fact shall be *prima facie* evidence of extortion, and this *prima facie* presumption must be overcome by proof that the charge was not extortionate, and it is further provided that either party may have a jury to try this question. Our Supreme Court have construed the law to mean only this much.

In the case of *C. & A. R. R. Co.* v. *The People*, 67 Ill. 11, Chief Justice Lawrence, for the Court, in deciding the act of 1871 to be unconstitutional, said:

"Before this act can be enforced, it should be so amended as to correspond with the requirements of the Constitution by directing its provisions against *unjust* discriminations. It should make the charging of a greater compensation for a less distance, or for the same distance, merely *prima facie* evidence of unjust discriminations, instead of conclusive evidence, as it now is, and it should give to the railway companies the right of trial by jury, not only on the fact of discrimination, but upon the issue whether such discrimination is just or not."

This decision was rendered in January, 1873, and the act in question was passed in May, 1873, and, as is evident, was made in exact conformity with this opinion of the Supreme Court. That this decision was rendered

in a case of unjust discrimination, cuts no figure in the case, as extortion and unjust discrimination stand together in all things in the statute. The same doctrine was held in the case of the *C. B. & Q. R. R. Co.* v. *The People*, 77 Ill. 443, Mr. Justice Sheldon, for the Court, there said, in speaking of the act of 1873, requiring schedules to be made, and punishing extortion:

"The evident purpose was, to regulate and fix, so far as the legislature might, the rates of railroad charges, and to punish the taking in excess of the fixed rates; and the form of the provision, making the schedule of rates *prima facie* evidence of what were reasonable maximun rates, was, doubtless, to avoid the objection indicated in the opinion in *C. & A. R. R. Co.* v. *The People*, 67 Ill. 11, to the legislature, making any fixed rates conclusive of what was reasonable, and to follow the intimation in that opinion, that they should be made but *prima facie* evidence. It is true, that the taking higher rates than those fixed by the commissioners' schedule of rates is not the exact form of the statutory offense, and the taking of such higher rates might not subject to the penalties of the statute, upon the making of proof that they were fair and reasonable."

These conclusions and constructions of this act by the Supreme Court of Illinois have never been controverted or denied, and they may therefore be held to be the settled law of the State.

The Constitution of the State authorizes and requires the passage of such a law as this. Sec. 12, Art. XI, of the Constitution of 1870, declares:

"Railways hertofore constructed or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be perscribed by law. And the General Assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State."

Sec. 15 of the same article provides:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises.

It will thus be seen that the legislature had the highest authority for their action in adopting the law of 1873. They had first the expressed will and demand of the people of the State, who adopted it in their fundamental law. They had next the clear and positive direction of the Su-

preme Court of the State as to how the law should be framed and if any law can have more and better authority for its existence, we cannot conceive how or from whence it can be obtained.

But let us now see how this law will operate in practical action.

Suppose this case had been tried in the court below instead of having been submitted on an agreed state of facts. A jury is called and proof made that the amounts claimed had been charged by the railroad company. The schedule of the commissioners was offered in evidence, showing that the charges of maximum rates fixed in such schedule were lower than the rates charged by the company. By the statute we have now made a *prima facie* case of extortion on the part of the railroad company. The company must either admit this to be true, or they must proceed to show that the charges they have made are in fact not extortionate. Either of these courses are open to them. If it is true that the charges are not extortionate, it can easily be proven. The railroad company have all the means at hand to make the proof. The evidence is all in their own power and under their own control. They have their engineers, their clerks, their agents, their books, their tariffs, their lists, and everything at hand to show the exact cost of carrying every pound of each class of freight to and from every point on their road, or to which their line extends. If they produce this evidence and show that their charges are reasonable, they have overcome the *prima facie* case made by the schedule, and they go acquit. If they do not offer to prove these facts, do they not admit that their charges are extortionate? They can not avoid this conclusion. The logic of the law fixes this beyond question. But what was done in the case at bar? It was admitted that the charges in the seventeenth count of the declaration were made, and that these charges were greater than the rates fixed by the schedule of the commissioners. What did the railroad company then do? Did they offer to show that the rates charged were not extortionate, and that those fixed by the schedule were too low? No, they admitted everything as claimed, but asserted their right under their charter to charge the rates collected. What is this right claimed? What do they assert their right to do under their charter?

Why, they simply, plainly, and directly assert their right under their charter to extort what they may see fit from the people who patronize their road.

Their claim, when stripped of useless verbiage and stated in plain terms, is exactly this, nothing more nor less. They claim and insist upon the right of extortion. While every other citizen of the State is compelled to obey its laws, and all those dealing with the public are prohibited from committing extortion upon the public, this corporation claims to have an inalienable, chartered right to extort. They do not claim in this case that they are not guilty, but that they have the *right* to extort whenever their board of directors, by their by-laws, may choose to do so. They say farther, that the State of Illinois made a contract with them that they might practice extortion whenever, by their by-laws, they saw fit.

What is this right, in plain language, which they now claim from the State? Webster defines extortion to mean:

"The act of extorting; the act or practice of wresting anything from a person by force, or by any undue exercise of power."

He defines the word *extort* to mean:

"To wrest or wring from by physical force, by menace, duress, violence, authority, or by any illegal means; to wrench away from; to gain by force; to exact, as to extort contributions from the vanquished, to extort confessions of guilt or the like. 2. (*Law.*) To take unlawfully, as an officer, by color of his office, any money or thing of value that is not due, or more than is due, or before it is due."

Blackstone says:

"Extortion is an abuse of public justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due. The punishment is fine and imprisonment, and sometimes a forfeiture of the office."

Sec. 211 of the Criminal Code of Illinois provides that:

"If any judge, justice of the peace, sheriff, coroner, constable, police officer, clerk or other officer, State, county, town or municipal, executive, ministerial or judicial, shall willfully or corruptly receive or take any fee or reward to execute or do his duty as such officer, except such as shall be allowed by law, or if any such officer shall willfully or corruptly ask or demand, as a condition precedent to the performance of his duty as such officer, any fee or reward, except such as shall be allowed by law, every such officer so offending shall be fined not exceeding $200, and may be removed from office."

The foregoing definition of extortion, and the penalties affixed to th commission of the offense in other cases, make it still harder for us to be lieve that the State of Illinois, while severely punishing the offense i other cases, deliberately contracted with a railroad corporation that the might commit the offense when, and as often as they might, by their by laws, determine.

It is useless to deny, or attempt to dispute the fact, that a railroa may be guilty of extortion, like any common carrier dealing with th public. We can hardly suppose that the astute counsel for the railroa company will attempt to deny this. If it may be guilty of extortion, wi not the conclusion necessarily follow in this case, that if the company ha the unlimited and unrestrained power to fix or establish its own rates, may fix or establish extortionate rates? Or, will counsel argue that the com pany cannot go so far as to be guilty of extortion, but that there is an im plied contract in the charter, that the rates shall never be fixed at such sum as to be extortionate? One or the other of these positions the com pany must take. If they take the first, they assert the right of the Stat to license the commission of a crime—the crime of extortion. If they take the other position, that their power is limited by implication to fixing legal rates, then they take just the position occupied by us.

We claim that under the contract with the railroad company the State has no right or power to fix, establish or interfere with the rates o toll fixed by this company, *unless these rates become illegal or extortionate.* But, when they do become such, then the State, in the due exercise of its sovereign police power, has the right to step in and say, you may no commit a crime against the law. You cannot commit extortion with im punity. There was an implied contract that you should not violate the law. This is what the State has claimed in this case—nothing more nor less. The State made the charge; the company, instead of denying it declared that it had a *right* under its charter to do the act charged, and now puts its case upon that claim of right. The State, in making this charge, is not interfering with property or the property rights of this company, any further than it may interfere with the property of *any* per-

son to restrain crime. This the State always had the right to do. Every one holds his property subject to the right of the State to prohibit its use to the injury of others. Every person's property is his own and entirely under his own control *unless it interferes with or endangers the rights of others*, but when it does this the State has a right, and it is its duty, to come forward and control the property. So in this case, the toll belongs to the company; can be fixed, regulated and disposed of by the company absolutely as its own, unless others may be injured thereby, when the State in the performance of its legitimate duty, comes forward and punishes those who make such injurious use of it. The controversy between ourselves and our adversaries is now brought down to very narrow limits. It must be admitted that the law of the State, of 1873, is not in any manner a fixing, regulation or an interference with the tolls fixed by this railroad company.

It is nothing more than giving authority to three persons,—officers of the State, under oath and under bonds,—to fix what they believe to be a reasonable maximum rate for the carriage of freight and passengers upon the railroads of the State. This maximum rate so fixed by them is not the rate which railroads are obliged to charge. There is no such law and no such obligation attempted to be forced upon them. They may charge whatever sums they please. But there is a law against extortion on the statute books of the State, as there is upon the statute books of every other State and civilized nation upon the face of the globe, and there always has been such laws since laws were established. No one has ever been heard to complain of the laws against extortion, unless it was some one who had reason to *fear* the law. What reason can be advanced why railroad companies should not be subject to the criminal laws of a State, as other citizens? The statute has so made them subject and they certainly cannot consistently claim to be exempt. The statute has established merely a rule of evidence for the trial of cases of extortion against railroads, just as it has in many other cases made definite rules. As, for instance, under a charge of larceny the possession of the stolen goods shortly after the felonious stealing of the same, is held to be

prima facie evidence of guilt. The statute for the protection of bank depositors in Illinois makes the failure, suspension, etc., of the banker or broker within thirty days after the receiving a deposit *prima facie* evidence of an intent to defraud. And many other evidences of this character of legislation, appear upon the statute books of every State, and even among the statutes of the United States. There is, then, nothing singular in the declaration that charging more than the schedule rate shall be *prima facie* evidence of guilt. Where and how are the rates fixed by the company in any way interfered with, by the establishment of this rule of evidence?

The whole argument of counsel is based upon the theory that this law, in some way, does interfere with or take away from the company the right to fix its own rates of toll. Counsel continually assert that the question in this case is a question of the *power to fix rates*, not a question of the reasonableness of rates. We take issue with him upon this proposition, and assert that this case is *all* about the *un*reasonableness of rates, and not in any way concerning the power to *fix rates*. This suit was brought and maintained, alone, upon the ground that the rates charged by this company were unreasonable and extortionate and that by reason thereof the company had become liable to the penalty. The schedule of the commissioners was introduced, or was admitted in evidence in the case, as *prima facie* evidence that the rates charged were unreasonable and extortionate. The case ended there. No farther evidence was offered. Was this a case about *fixing rates?* If so, what rates were fixed? Suppose the next day another suit had come up for trial upon a similar charge, would the rates fixed in the first case be binding in the second? If not, how and when were they *fixed?* If they were *fixed*, then they *were* the rates, and none others could be charged. This case was tried several years ago, and what rates has it fixed or changed or regulated upon this road or any other, by reason of this suit? A penalty has been inflicted for extortion, for charging unreasonable rates, but what else has it done? What rates have been affected or influenced? It is absurd to urge such an argument upon an intelligent Court that this case is about fixing the rates of toll.

As well might it be claimed that in a trial for the larceny of a horse, that the suit was about the horse; or in an action of slander against John Smith, that the suit was about John Smith; or in an action for damages committed by defendant's dog, that the suit was about a dog.

In such cases the untutored public might use the expressions stated, but certainly no lawyer would say that the suit was about the horse or the dog, they having been the mere instruments committing or being used in the commission of the offense, which the suits were, in fact, about. If this suit fixed the rates for the carriage of freight, then the Central Road must have been bound by the amount fixed. But will any one claim that they have paid any attention whatever to the rates there fixed? If they were fixed in that suit by the State, then the Illinois Central Railroad, hereafter, is precluded from ever showing that these rates were too low. If another suit should be brought against the road for extortion, the proper evidence on the part of the State would be the record in this case to show what rates were fixed, and this evidence must be conclusive, according to the argument of counsel, for, according to their theory, the law or the suit fixed the rates to be charged. I should be very much afraid, however, to risk the case upon that theory, for I believe in a second case, even between the same parties, over the same route, between the same points, under the same complaint, that the State would have to introduce the schedule of the commissioners' as evidence instead of the record in this case, and that the company would then have the right to introduce evidence to show that the schedule rates were too low. If such be the case, then neither the law nor the action under the law fixed, regulated, changed, or interfered with any rates fixed by the board of directors of this railroad in their by-laws or otherwise. Suppose that in this case the railroad company had paid the penalty found by the Court, could the company not then very properly have said, we have done all the law required of us. We paid the penalty fixed by the law, and that matter is settled and ended. We may adopt the schedule rates, or we may not. If we do, we have simply exempted ourselves from liability for another penalty; if we do not, we will, under

the law, be liable for a greater penalty the next time. The argument of course carried out to its full extent, would lead to great absurdities. For instance: The penalty fixed for the crime of murder by gunshot wound, is death, or imprisonment for life, or some other term. Under the theory of counsel for plaintiff in error, this would be a law fixing or regulating the use of a gun.

The penalty for running through a toll gate, without paying the toll, is ten dollars. This would be a law regulating the tolls on the turnpike. The federal law provides a punishment for making counterfeit money; this would be a law fixing or regulating the manner of making money. The more this point is examined, the more absurd seems the argument that this law in any way seeks to fix, regulate, or affect the toll authorized to be fixed by the company.

Then if it be true that this law, nor the action under it, in any way attempts to fix, or change, or regulate, the tolls to be charged by this railroad company, how does it impair any contract between the State and the company? How does it violate any provision of the Constitution of the United States, or any law or rule of law? We admit that if the law made the charging of more than a certain sum *conclusive* evidence of extortion, that then it might be claimed, with some show of reason, that it was a fixing or regulating of the tolls, because the railroad being required to obey the law, would be limited to the toll fixed by the law. But such is in no manner the case here. Counsel attempt to avoid this point by a general assertion that a law making the fixing a maximum rate of toll *prima facie* evidence of its reasonableness, would be unconstitutional. The Supreme Court of Illinois has not held it unconstitutional, but on the contrary held it to be a constitutional law, and, as we have seen, advised that the law be drawn in this way to make it constitutional. This case has been tried in a court holding the law constitutional, no matter what the courts of Vermont and Rhode Island may have held. Upon examination of the cases cited by counsel upon this point, we find that they do not in any manner assert the doctrine, that a law fixing and declaring what shall be *prima facie* evidence of a fact, is unconstitutional.

On page 58 of the argument of Mr. John N. Jewett, counsel for plaintiff in error, the statement and authorities on this point may be found. The first case cited by him in support of his statement is the case of *Plimpton* v. *Town of Somerset*, 33 Vt. 283. In that case the legislature of Vermont had passed an act authorizing the county court to refer any civil action to one or more commissioners, whose report should be *prima facie* evidence of the facts. This law was held to be unconstitutional because it deprived the party of the right of trial by jury. In the case here, the right of trial by jury is expressly reserved. In the Vermont case the commissioners tried the case under the order of the court, and neither party could demand a jury trial. The authority is in no way applicable to the case at bar. The other case relied upon was the case of *Francis* v. *Baker*, 11 R. I. 103, and is very similar to the Vermont case. The law of Rhode Island provided that when a cause was at issue in one of the courts of that State, the court might in its discretion appoint one or more auditors, whose report should be *prima facie* evidence of the fact. This was also held to be unconstitutional because it did not provide for a jury trial. In each of these cases a trial of the parties rights upon a cause pending in court was being had, and neither party could have a jury, and the law therefore violated that provision of the Constitution of each State which declared, "the right of a trial by jury shall remain inviolate."

The fixing of a schedule of maximum rates of toll is not a trial of any one's rights. No right of a trial by jury is by this act taken from any one, because whenever an issue is made up, a trial by jury is especially provided for. In the United States Bankrupt Law, Sec. 4992, it is declared that "copies" of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts therein stated."

This act has never been held to be unconstitutional, although it comes very near the line of the Vermont and Rhode Island cases.

In Sec. 5130 of the Revised Statutes of the United States, concerning fraudulent transfers of property, it is declared, that—

"The fact that such a payment," etc., "of a debtor's property as is described in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud."

Many instances of such legislation may be multiplied, but it must be unnecessary. Anything which is in effect a trial of an issue of fact between parties to an action that deprives them of the right to a jury, is, of course, unconstitutional and void. But the mere fixing of a fact and making that fact *prima facie* evidence of another fact, has never yet been so held.

Counsel say:

"But if the present rates, as fixed by the Railroad and Warehouse Commissioners, could be held to be reasonable, and, therefore, presumptively binding, what is there in the law to prevent them from fixing the maximum rate for the transportation of seventy barrels of salt over the Illinois Central Railroad from Chicago to Tuscola, at ten dollars, or even one dollar, instead of twenty-four dollars and eighty cents."

We answer, that there is nothing whatever to prevent them from doing this, except the presumption that every officer will do his duty, and that he will not be guilty of oppression or wrong in the performance of his duties. But suppose the commissioners *did* fix, in their schedule, the maximum rate for the carriage of the property in question, between the points named, at one dollar. We admit their *right* to do this. But how would such a schedule affect or injure the railroad company, or in any way affect the tolls fixed by the company? They may say that they would be sued. Certainly; but any one may be sued any and every day of his life. And, if he does not go into court and defend himself, he may be mulcted in damages also. The railroad company would have a right to go into court and defend itself when sued, and have its case tried by a jury of its peers, like any other citizen. When the schedule of the commissioners is introduced in evidence, showing that *prima facie* a reasonable maximum rate for the transportation of a car load of goods from Chicago to Tuscola was one dollar, and the railroad company offered no evidence to rebut this presumption, as a matter of course they would be defeated and would have to suffer the penalty. But if, on the contrary, they introduce evidence to show that one dollar was too low a rate, and that one hundred dollars was

a reasonable rate, they would succeed in their suit. The right to fix *prima facie* a reasonable maximum rate, by no means can be held to fix or establish that as the rate to be charged. It simply shifts the burden of proof from the State to the railroad company. The law does this and nothing more. And can it be argued that this is not right and just? The people have no means of determining what are reasonable rates for the carriage between any two points. All the facts and figures upon which such matters can be determined are in the hands of the railroad company. It, and no one else, can tell the cost of running a train between certain points and in conveying a car load of freight over the same distance. It is impossible to obtain the evidence of these facts from any other source than from the officers and managers of the road themselves, as no one else can tell how much they pay to their engineers, their firemen, their conductors, brakemen, agents, or other officers, and the other numerous items of expenses that all go to make up the cost of conveying a train or a car over a section of a railroad. By the law of 1873, each railroad company is required to make a report to the Board of Railroad and Warehouse Commissioners of various matters concerning their business, and the board have the right to make such additional inquiries as they may deem necessary. From these reports the board make their schedules of maximum reasonable rates. It cannot be supposed that these schedules so made up are exactly right or just in all things, but the railroad companies have the power to correct them wherein they are wrong. Were it not for this law, how is it possible that railroad companies could ever be punished for extortion? It would be out of the question that any case of that kind could ever be established, and with this law there can be no danger of injustice ever being done, because the court is open to hear any evidence that may be offered. It may be said that the State can call the officers and managers of the road to prove the case against the road. This would fail of attaining the object, for they could not be compelled to testify against or criminate themselves. Either, then, the effort to prevent extortion by railroads must be abandoned, or this law must be sustained. If abandoned, we will have in Illinois a worse state of affairs than existed

when the so-called granger excitement arose so high, necessitating the passage of some law to restrain the encroachments of the railroads.

This granger feeling has been the subject of much ridicule on the part of railroad men and the basis for much unjust criticism on the part of railroad attorneys. And, while it is undoubtedly true that in all uprisings of the people there is much wrong done and much unreasoning prejudice exhibited; yet, it will always be found that there is some good reason for it at the bottom of the agitation, and it is never safe to ignore them. Our people are proverbially slow to abandon their own pursuits and engage in anything of a public nature. They are long suffering and slow to anger, but when they are aroused they are very tenacious of their rights and will most surely see that they are preserved. The granger agitation of 1872 and succeeding years would never have existed had railroad companies acted fairly with the people. It is ridiculous for any sensible man to attempt to argue that there was no just foundation for this granger feeling. It was impossible that it could have been aroused without some good cause. To argue the contrary, implies that counsel believe the people of this country to be fools or ignorant, discontented agitators, which they are, in fact, very far from being. For it has been proven beyond cavil that the people of this nation, as a class, are the most industrious, quiet, contented and intelligent people on the globe.

I shall not attempt an answer to the attack made by counsel upon the decision of this Court in the Munn case. The counsel making the attack, I believe, was one of the defeated counsel in that case, and I concede his right to resort to the only remedy he has now left. But, I do not hesitate to say that the decision of this Court in that case has given entire satisfaction to the whole civilized world, except those owning or operating railroads, or their attorneys. And if they succeed in overturning that decision, as counsel say they hope to do, it will be the greatest calamity that can befall this country.

I have no time to enter into a discussion with counsel now, as to whether railroads are public or private highways. This question, it seems to me, can not enter into this controversy, nor become a necessary element

in the determination of the questions involved. That railway companies are common carriers, surely, cannot be disputed, and if so, the State has the right to prevent them from committing extortion upon those for whom they carry. This is the only question here, and the question whether the State, in exercising its power of eminent domain upon the property of private citizens, taking their property from them, and giving it to a railroad company to always use and occupy as their own, is doing it upon the ground of charity, or as a right which the company has to demand of the State, because it is a *railroad* company, or upon the theory that the road is to be used as a public highway, can make no difference in this case. The argument of counsel upon this point, would make the company who were chartered by the State to improve a river, the owners of the river.

If railroads are private property, built, operated and managed solely for private interest, the Illinois Central had better surrender the three million acres of the public domain which it has obtained from the State of Illinois under false pretenses, and the other railroads of Illinois had better surrender the untold millions they have taken from the people of the State of Illinois in the shape of taxes levied upon their property to build railroads with which to extort from these tax-payers as much money for the carriage of their persons and property as the said company *or its board of directors may by their by-laws* choose to take. It is a very singular doctrine, either of law or equity, to be advocated by a careful and astute lawyer, that the State can take the money and private property of one citizen by force and donate it to another citizen to be his private property forever. But exactly this thing has been done by the State of Illinois ever since railroads were begun in the State, according to the arguments of counsel for plaintiff in error. It is strange that the State did not discover sooner the fact that it was perpetrating this great wrong upon its citizens in aiding so liberally, as it always has done, these *private* enterprises. The State, according to this theory, has not only robbed her own citizens, but has done so that she might give the money taken from them to those, *first to be considered*, gentlemen in England who own the stocks of the Illinois Central Railroad.

I ask the pardon of the Court for using strong expressions in this argument, but there seems to be no other way to treat the very *ultra* and one-sided argument which I am compelled to answer. Could counsel take a conservative view of the all-important legal conundrums of the day—the settlement of the relations that should exist between railroad corporations and the State—there would be no need to use strong words or to travel outside of the record to more thoroughly illustrate their absurdity.

It is unnecessary, in this case, to enter into the question of the police power of the State, as that has been very fully discussed in our briefs in the Ruggles case.

But there is one idea suggested by the decision in the case of *Bonaparte* v. *The Camden & Amboy R. R. Co.*, Baldwin, 216, that is very worthy of consideration. It is, that if this corporation, or its board of directors, has the unrestrained power of fixing its own charges for fare and freight, then it is, what counsel on the other side claim it to be, a purely private corporation, engaged in a private employment—and controlling, in all respects, private property, in which the public have no interest, and concerning which they have no rights or powers.

This must be the necessary conclusion from these premises, but no court can surely hold or enunciate such a doctrine. It would destroy the whole theory upon which was based the right or power of the States to aid in their construction. It is said, the doctrine that the State or the public have an interest in railroads, would take away from the stockholders five hundred millions of dollars worth of property in Illinois alone. This assertion is without any basis or foundation in reason. No one desires or is attempting to take away one dollar of their property.

The claim of counsel who defend the interest of the public in the railroads, only asks that this money and this property shall not be used to the injury of other citizens; that railroad property and railroad money shall be used as other money and other property is used, to-wit: for the sole use and benefit of the holder, so that he does not injure his neighbor thereby. A conservative, consistent view, it seems to me, that should be taken upon

these questions, would be to hold that all railroad property should be held and used *first* for the benefit of the public, *second*, for the benefit of the stockholders, manager, or operator. This reversal of the rule, urged by counsel for plaintiff in error, would do much more to harmonize and settle the numerous questions involved, than any other that could be adopted, and we hope this Court will at once, and so plainly that it cannot be misconstrued, declare this principle. By so doing many now controverted questions will be settled, peace and harmony will prevail between railroad corporations and the people, and both will grow and prosper together.

Respectfully submitted.

JAMES McCARTNEY,

Attorney-General Illinois.